TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 69

DR. EDWARD A. BARSKY, APPELLANT,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MAY 13, 1953

Probable jurisdiction noted October 12, 1953

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 4, 1953.

[fol. 1]

BEFORE THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK, COMMITTEE ON GRIEVANCES

In the Matter of the Application for the Revocation of the authorization and license heretofore granted to Dr. Edward K. Barsky to practice medicine in the State of New York, and for the cancellation of his registration as a physician, or for such other relief as the premises warrant.

To the Department of Education of the State of New York and the Committee on Grievances appointed by the Regents in accordance with Section 6515 of the Education Law of the State of New York:

Charges—April 1, 1948

The petition of Joseph J. McCullough, a duly appointed Inspector of the Department of Education of the State of New York, respectfully shows, on information and belief, as follows:

First: The above-named Dr. Edward K. Barsky, hereinafter referred to as respondent, graduated from the College of Physicians and Surgeons of Columbia University on February 1919, and on March 14, 1919 received license 14704 from the New York State Department of Education, which authorized him to practice medicine in the State of New York.

Second: Respondent maintains an office for the practice of medicine at 54 East 61st Street, in the Borough of Manhattan, County, City and State of New York.

Third: Heretofore and on or about March 31, 1947, respondent was indicted in the District Court of the United States for the District of Columbia, by the Grand Jurors thereof, duly empaneled, in an indictment which charged this respondent with the crime of contempt of the House of Representatives' Committee on Un-American Activities, in failing to produce books, ledgers, records and papers in response to a subpoena issued by authority of the House [fol. 2] of Representatives of the Congress of the United

States in a matter pertaining to an investigation then being conducted by the aforesaid Committee.

Fourth: That thereafter and following trial, the respondent herein was found guilty of the aforesaid crime, and on July 16, 1947, in the aforesaid court, the respondent was sentenced to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment for a period of six months in a common jail, and to pay a fine of $500.

Fifth: That by reason of the foregoing, respondent has been convicted of a crime in a court of competent jurisdiction, within the purview and meaning of Section 6514, subdivision 2(b) of the Education Law of the State of New York.

Sixth: The sources of my information and the grounds of my belief as to the statements herein set forth on information and belief are the records of the District Court of the United States for the District of Columbia, and the records of the New York State Department of Education.

Wherefore: the authorization and license heretofore granted to Dr. Edward K. Barsky to practice medicine in the State of New York should be revoked and cancelled, and his registration as a physician should be annulled and cancelled of record, or such other and further relief as the premises warrant should be granted.

(Sgd.) Joseph J. McCullough

Dated: 1st day of April, 1948.

[fols. 3-5] *Duly sworn to by Joseph J. McCullough; jurat omitted in printing.*

[fol. 6] BEFORE THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK, COMMITTEE ON GRIEVANCES

[Title omitted]

AMENDED ANSWER—February 9, 1951

Respondent, for his amended answer to the petition:

1. Admits the allegations contained in paragraphs First and Second.

2. Upon information and belief, denies the allegations of Paragraph Third, except admits that in or about 1947 respondent was indicted in the United States District Court for the District of Columbia, for alleged contempt of the Un-American Activities Committee of the House of Representatives (hereinafter called the House Committee).

3. Upon information and belief, denies the allegations of paragraph Fourth, except admits that after trial in said Court, respondent was found guilty of alleged contempt and in or about July 1947, was sentenced to imprisonment for six months and fined $500.

4. Upon information and belief, denies the allegations contained in paragraph Fifth.

5. Upon information and belief, denies the allegations contained in paragraph Sixth.

For a First Separate Defense Respondent Alleges Upon Information and Belief:

6. Jurisdiction herein is predicated upon the alleged commission of a crime within the purview and meaning of Section 6514, Subdivision 2b of the Education Law of the State of New York.

[fol. 7] 7. The alleged contempt of which respondent was found guilty in the United States District Court for the District of Columbia, was not then and is not now a crime under the laws of the State of New York, and was not and is not within the purview and meaning of Section 6514 Subdivision 2b of the Education Law of the State of New York.

8. There is no jurisdiction in the Department of Education, the Board of Regents, the Committee on Grievances or its Sub-Committee or the petitioner, to make, entertain, file, hear or to try the alleged charges herein.

For a Second Separate Defense Respondent Alleges:

9. Respondent repeats the allegations contained in paragraphs 6 through 8 with the same effect as though set forth at length.

10. Upon information and belief, the alleged contempt of which respondent was found guilty in the United States District Court for the District of Columbia, was not then, and is not now, a crime under the laws of the United States, although even if it were, jurisdiction would still be lacking by reason of the allegations contained in paragraphs 6 through 8 of this answer.

For a Third Separate and Distinct Defense Respondent Alleges Upon Information and Belief:

11. Sections 6514 and 6515 of the Education Law of New York State are unconstitutional and violate the Federal and State Constitutions. They contain and constitute an unlawful delegation and abdication of legislative power and function to, and the Legislature set up no guides or standards for the conduct of the Department of Education, the Board of Regents, the Committee on Grievances, or its Sub-Committee, or for any other body, in connection with the [fol. 8] punishments to be imposed for the infractions set forth in Section 6514, thus permitting unlimited, arbitrary, capricious and discriminatory action by said bodies.

12. Further, said sections are contradictory, vague, uncertain and indefinite and fail to establish an ascertainable standard of guilt or of punishment and violate the Federal and State Constitutions.

13. In the Penal Law and elsewhere, the Legislature, in pursuance of its legislative function and power, set forth definite ranges of punishment for each crime and for each degree of the same crime. The same is true in other statutes imposing penalties or punishments for other offenses. In Sections 6514 and 6515, however, the Legislature abandoned and delegated this function and power to the Department of Education, the Board of Regents, the Committee on Grievances and its Sub-Committee, which have unlimited and arbitrary power to impose any punishment from reprimand to revocation of a medical license upon a physician, as they in their sole and unlimited discretion see fit, irre-

spective of the nature of the crime or the offense or the infraction involved, and irrespective of the degree of the crime or the offense, and irrespective of its relationship to the practice of medicine or to the presence or absence of moral turpitude.

14. Said mentioned bodies have it within their power to legislate, to do so in a discriminatory and arbitrary manner, to impose arbitrary and discriminatory punishment, and in fact to reverse the legislative intent and the degree of punishment indicated by the Legislature in the Penal Code and elsewhere. For example, said bodies might, if said sections are valid, impose upon one physician, a mere reprimand for a heinous first degree assault, while they might impose upon another physician complete revocation of his license for a third degree assault; they might impose a mere reprimand [fol. 9] or short suspension upon one physician for the performance of abortions or for selling narcotics, while they might discriminate against another physician by arbitrarily imposing a harsher punishment for a non-medical infraction that has no moral turpitude.

15. Irrespective of whether said bodies have exercised their powers in a reasonable fashion, nevertheless if said sections are valid, said bodies do have these legislative functions and they do have the power to act in an arbitrary and discriminatory manner without any guideposts or standards to circumscribe and guide their actions or to circumscribe their unlimited power. Once the power exists, the sections are invalid irrespective of how the bodies do act. The sections are therefore unconstitutional.

For a Fourth Separate Defense Respondent Alleges Upon Information and Belief:

16. Sections 6514 and 6515 of the Education Law of New York, as applied to the facts of this case, violate the Federal and State Constitutions, the due process of law provisions thereof, are discriminatory against all physicians including respondent, constitute class legislation, and violate the public policy and sovereignty of New York State.

17. Said sections, as applied to the facts of this case, purport to seek to punish respondent and to endanger respondent's New York license to practice medicine, issued to

respondent, a New York Resident, by reason of an alleged contempt committed outside of New York. Said alleged contempt was not and is not a crime under the laws of New York. It was not and is not connected with respondent's practice of medicine. Said sections, as thus applied to the facts of this case, purport to attempt to give to the New York Department of Education, the Board of Regents, the [fol. 10] Committee on Grievances and its Sub-Committee, power to punish physicians including respondent, for an alleged contempt committed elsewhere that is not a crime in New York, a power which not even the New York Courts have. Said alleged contempt, not being a crime in New York, would not result in any punishment of or disqualification against any persons in New York other than physicians. Said sections, as so applied to the facts of this case, are discriminatory and class legislation, violates the Federal and State Constitutions and the due process clauses thereof.

18. To give extra-territorial effect to a conviction in another jurisdiction for an alleged contempt that is not a crime in New York, violates the sovereignty and the public policy of New York and the decisions of the New York Courts. If permitted in this case, it would be discriminatory against all physicians including respondent; it would be class legislation, and violative of the Federal and State Constitutions and the due process clauses thereof.

For a Fifth Separate and Distinct Defense, Respondent Alleges

19. The Joint Anti-Fascist Refugee Committee (hereafter referred to as the Organization) came into existence in about 1942, and was, prior and subsequent to April 1946, a completely philanthropic organization, devoted to the raising of funds and to the disbursing thereof for the benefit — the thousands of men, women and children who became refugees following the war in Spain, and were confined in concentration camps, were homeless, wounded or ill, and were in dire need of medical care, hospitalization, food, clothing, shelter and relief.

20. At all the times mentioned, said organization disbursed its funds for medical aid, hospitalization, food,

[fol. 11] clothing, shelter and relief and for the care of said victims, and maintained two hospitals, a home for children, and a rest home in France and Mexico; it further provided assistance for said refugees in Switzerland, Portugal, North Africa, the Dominican Republic and elsewhere; it still further provided transportation for said refugees to those countries that offered them asylum.

21. At all the times mentioned, the Franco regime in Spain was universally condemned by the United States and the governments of the United Nations.

22. At all the times mentioned, said Organization was a recognized "war relief" organization; it had been approved and licensed by the President's War Relief Control Board; it rendered regular reports to said President's War Relief Control Board; it furnished all the information called for by said Board; and it received complete tax exemption as a charitable organization from the Treasury Department.

23. The efforts of said Organization were sponsored and supported by most eminent persons throughout the United States and throughout the rest of the world, from all walks of life and all professions, including the medical profession.

24. Said Organization had an Executive Secretary, who received a salary, and who always had custody, possession and control of the books and records of the Organization and who was responsible for the functioning of the Organization.

25. Respondent became National Chairman of said Organization in or about 1942.

26. At no time did respondent receive any remuneration, salary or anything else, directly or indirectly from or through said Organization, but acted in a purely voluntary capacity.

[fol. 12] 27. Respondent, a practicing surgeon, a physician of some 30 years standing, gave as much of his time and efforts as he could, compatible with his active practice, in an endeavor to aid the aforementioned completely charitable efforts of said Organization, and to help the unfortunate victims it sought to succor. In addition to these efforts, respondent made substantial monetary contributions to aid said refugees.

28. After said Organization had been so licensed by the

President's War Relief Control Board, and while it made regular reports to said Board and functioned as a charitable organization, the aforementioned House Committee, (whose aims and methods were the subject of nation-wide condemnation, including condemnation by the President of the United States, condemnation on the floor of Congress and in other responsible quarters), did attempt, on or about December 1, 1945, and without any notice to said Organization and behind its back, to have the organization's license revoked by the said President's War Relief Control Board. This, the President's War Relief Control Board, refused to do.

29. At no time prior or subsequent to its aforementioned attempt to revoke the Organization's license on about December 1, 1945, did the House Committee invite or call upon said Organization to explain its activities. At no time did the House Committee call upon said Organization to refute the unfounded, hearsay claims, made by persons who had never been connected with said Organization. On the contrary, the only persons invited before said House Committee in connection with the work of said Organization, were persons who had never been associated with it, and who knew nothing about it, but who were used as pawns to aid the House Committee express its own bias, prejudice and hostility.

[fol. 13] 30. After said House Committee had clearly indicated its extreme and unfounded hostility and prejudice against said Organization, the said House Committee, in an obvious attempt to do harm to said Organization and to its contributors and to the recipients of its charity, demanded that said Organization deliver to it the names of its contributors and the names of the recipients of its charity.

31. Upon information and belief, this demand violated the traditional, accepted practices of all fund-raising organizations, all of whom keep the names of their contributors, and the names of the recipients of their charity, completely confidential.

32. Thereafter, the House Committee, in a hostile and prejudicial endeavor to obtain the names of the contributors and the recipients of the Organization's charity, served a subpoena therefor, on the said Executive-Secretary.

33. Despite the fact that the House Committee knew that the said Executive-Secretary had custody, possession and control over said books and records, it served respondent with a similar subpoena although it knew respondent did not have custody, possession or control over said books.

34. The Executive Board of said Organization voted not to authorize the transfer of the custody of the books and records of said Organization from its Executive Secretary to the respondent, and prohibited said transfer. The Executive Secretary, the recognized custodian of said books and records, had already been served with a subpoena therefor.

35. At no time did respondent have either custody or possession or control of the books and records so subpoenaed for production before the said House Committee.

36. It must be noted that among the contributors to said Organization, were Americans of Spanish descent, with [fol. 14] families still in Spain. Among the recipients of its charity, were Spaniards who also had families in Spain.

37. To reveal to this prejudiced, hostile House Committee, the names of the contributors to said Organization and to reveal to it the names of the recipients of its charity, would have exposed these families to reprisals by the Franco regime in Spain, including the definite danger of imprisonment and execution.

38. Said Organization being faced with this grave problem and responsibility, sought legal advice. Respondent also sought legal advice as to the subpoena served upon him for the books and records of which he had no custody, possession or control.

39. The Organization and respondent received legal advice that the aforementioned demands and said subpoenas of said House Committee, were unconstitutional and void. This was an opinion widely held throughout the country by eminent lawyers, and in responsible legal and other quarters. This opinion was also held by the dissenting Judge of Circuit Court of Appeals before whom this issue came on appeal. It is also to be noted that two Justices of the United States Supreme Court voted to grant respondent a review of his case.

40. To indicate its good faith and to indicate its earnest and well-founded belief of the hostility of and the harm in-

tended by said House Committee, said Organization publicly printed a financial statement of its affairs, and publicly invited and offered to permit any impartial group of Americans, other than said prejudiced, harm-seeing House Committee, to inspect its books and records. In addition, the Organization invited further investigation by the President's War Relief Control Board.

[fol. 15] 41. In his appearance before the House Committee and his testimony there, respondent answered all questions asked of him.

42. Respondent at no time intended to act in contempt of the Committee or to commit any offense, and at all times was acting in the best of good faith, and in accordance with the advice of legal counsel.

43. Although respondent never profited in any manner in his connection with said Organization, and although respondent acted according to the dictates of his own conscience and on legal advice and according to the highest standards of the medical profession in protecting those to whom respondent felt he owed a duty of trust, to protect the contributors from financial and other harm, and to protect the said families of contributors and of the recipients of said charity from imprisonment and execution, respondent was found guilty of alleged contempt. Respondent earnestly feels and states that he was not guilty of said alleged contempt.

44. On appeal, one of the Three Judges agreed with respondent, and deemed the actions of the House Committee utterly unconstitutional.

45. Thereafter on a petition for review to the United States Supreme Court, said Court did not render a decision for some two years, and even then, when said review was denied, two Justices of the United States Supreme Court voted to grant respondent a review. Upon information and belief, the fact that the Supreme Court denied review, does not mean it passed upon the merits, or that it agreed with the two-to-one decision below, or that it approved of the conviction.

46. Thereupon, respondent, who had never been convicted of any offense whatsoever, who had never even been charged [fol. 16] with any offense whatsoever, and who has never

been charged with any infraction before this body, suffered the indignity, the physical and mental anguish of actual physical imprisonment and confinement for 5 months.

47. Respondent was confined in an institution far away from his wife and child; he was permitted two visiting hours a month; he lost twenty-three pounds during his imprisonment; he lost five months away from his practice; he had to maintain his office in the interim so as not to lose his practice and he was forced to deplete his savings to continue to maintain his family and his office.

48. Respondent submits that in acting in a voluntary capacity in connection with said Organization, he participated in the alleviation of pain and suffering of human beings, without thought of compensation and without ever receiving any. In so doing, he feels he acted in the best traditions of his profession and in the spirit of the oath of Hippocrates.

49. Respondent has submitted the foregoing in some detail, in the firm belief that aside from what he understands to be the lack of legal basis for the charges herein, as aforementioned, respondent seriously doubts whether the Department of Education, the Board of Regents, the Committee on Grievances, or its Sub-Committee, or the Secretary of the Grievance Committee or the petitioner, would ever have filed or entertained these charges against respondent, had they really been aware of the true facts of this situation.

50. Respondent asserts that his conduct is compatible with the highest standards of the medical profession. Respondent seriously doubts whether any member of any of the bodies aforementioned, if similarly associated with any charitable organization and if faced with the trust and [fols. 17-25] the fate of the contributors to said Organization and their families, and the trust and the fate of the victims aided by said Organization and their families, would or could have done otherwise in the dictates of good conscience.

Wherefore respondent prays that the petition be dismissed. Respondent further prays that he be relieved from any possible odium that may attach by reason of the mak-

ing of the charges against him and that appropriate exoneration be noted on the record herein.

Dated: New York, February 9, 1951.

(Sgd.) Edward K. Barsky.

Duly sworn to by Edward K. Barsky. Jurat omitted in printing.

[fol. 26] In Supreme Court of New York, Special Term, County of Albany

Order Transferring Proceeding to Appellate Division, Third Department—November 8, 1951

Upon the annexed affidavit of Abraham Fishbein duly sworn to, the petition herein verified October 23, 1951, the order to show cause dated October 29, 1951 from which it appears that petitioner, on October 29, 1951, commenced a proceeding in the Appellate Division, Third Department, pursuant to Article 78 C. P. A. and Section 6515 of the Education Law for an order annulling the determination of the Board of Regents suspending petitioner's license to practice medicine for six months, and on the consent at the foot hereof, it is

Ordered that the above proceeding commenced by petitioner in the Appellate Division, Third Department, on October 29, 1951 by the petition of the petitioner in that Court verified October 23, 1951 is hereby deemed such a proceeding in the Supreme Court, Albany County, nunc pro tunc as of October 29, 1951, and it is further

Ordered that said petition of petitioner is hereby amended to read "Supreme Court, Albany County" instead of "New York Supreme Court: Appellate Division, Third Judicial Department," and it is further

Ordered that subsequent to the service upon respondent of a copy of this order with notice of entry, respondent file [fol. 27] its answer to the petition and make a complete return herein, in the said Appellate Division, Third Department, and it is further

Ordered that this matter is transferred to the Appellate

Division, Third Department, for appropriate review under Article 78 of the C. P. A. and Section 6515 of the Education Law of the determination, action and order of the respondent, in connection with the matters set forth in said petition and for a review of the respondent's order dated October 5, 1951 suspending petitioner's license to practice medicine and his registration as a physician for six months and that the parties proceed accordingly.

Enter, Isadore Bookstein, J. S. C.

Entry of the above order is consented to.

Abraham Fishbein, Attorney for Petitioner. Nathaniel L. Goldstein, Attorney General, Attorney for Respondent.

[fol. 28] In Supreme Court of New York, Albany County
Petition for Review—October 23, 1951

The petition of Dr. Edward K. Barsky respectfully shows to this Court as follows:

I. Petitioner was graduated from the College of Physicians and Surgeons of Columbia University in February 1919. On or about March 14, 1919, he received license No. 14704 from the New York State Department of Education which authorized him to practice medicine in the State of New York.

II. Petitioner maintains an office for the practice of medicine at 54 East 61st Street, Borough of Manhattan, City and State of New York.

III. Petitioner is a physician and surgeon, and has been practicing surgery for about thirty years.

IV. On or about April 1st, 1948, one, Joseph J. McCullough, an Inspector of the Department of Education of the State of New York, presented a petition and charges to said Department of Education and its Committee on Grievances, seeking the revocation of petitioner's license to practice medicine and for the cancellation of his registration as a physician.

V. Said petition was based upon the charge that after a trial in the U. S. District Court for the District of Columbia,

your petitioner was found guilty, on July 16, 1947, of failing to produce books before a House of Representatives Com- [fol. 29] mittee, and was sentenced to six months imprisonment and was fined $500. By reason thereof, the said Department of Education Inspector concluded that petitioner had been convicted of a crime within the meaning of Section 6514, subdivision 2b, of the Education Law of the State of New York.

VI. Petitioner interposed an answer in substance as follows:

(a) That the offense of which he had been convicted is not a crime under the laws of New York, does not come within Section 6514 2b of the Education Law, and therefore jurisdiction is lacking on the part of the respondent.

(b) That the offense is not a crime under the laws of the United States.

(c) That Sections 6514 and 6515 of the Education Law violate the Federal and State Constitutions and are also unconstitutional as applied to the facts of the case, all as set forth in detail in said answer.

(d) The answer further sets forth the following (which was proved on the hearing and which was not controverted by any testimony whatsoever):

1. The Joint Anti-Fascist Refugee Committee (known as the Organization) came into existence in about 1942 and was at all times completely philanthropic in nature. It was devoted to the raising and disbursing of funds for the benefit of the thousands of men, women and children who became refugees following the war in Spain, and were confined in concentration camps, were homeless, wounded or ill, and [fol. 30] were in dire need of medical care, hospitalization, food, clothing, shelter and relief.

2. The Organization also maintained two hospitals, a home for children and a rest home in France and Mexico. It also provided assistance for these refugees in Switzerland, Portugal, South Africa, the Dominican Republic and elsewhere, all without any discrimination whatsoever as to race, color, creed or belief. (In fact the actual disbursing of the funds was done through organizations like the Unitarians, or the Board of Christian Missions.)

3. The Organization was a recognized war-relief organization and had been approved and licensed by the President's War Relief Control Board. It rendered regular reports to said Board and furnished all the information called for and had received tax exemption as a charitable organization from the Treasury Department.

4. The efforts of the Organization were sponsored and supported by most eminent persons throughout the United States and the rest of the world, from all walks of life and professions, including the medical profession.

5. The Organization had an executive secretary who received a salary and who always had custody, possession and control of its books and records and who was responsible for the functioning of the Organization.

6. Petitioner became national chairman of the Organization in or about 1942. At no time did he receive any remuneration, salary or anything else. He acted purely in a [fol. 31] voluntary capacity. Petitioner, a practicing surgeon and physician of some thirty years standing, gave as much time as he could, compatible with his active practice, in an endeavor to aid the charitable efforts of the Organization. He also made monetary contributions to aid the victims it sought to help.

7. On about December 1, 1945, the House Un-American Activities Committee, without any notice to the Organization and behind its back, attempted to have the Organization's license revoked by the President's War Relief Control Board, but the Board refused to do so.

8. The said House Committee and its aims and methods were, at the time, the subject of nationwide condemnation, including condemnation by the President of the United States, condemnation on the floor of Congress, and in other responsible quarters. (The Attorney General formally conceded this claim, as will be pointed out later on.)

9. At no time prior to its attempt to revoke the Organization's license, did the House Committee ever notify or call upon the Organization to explain its activities nor did it ever offer an opportunity to the Organization to refute the unfounded, hearsay claims made by persons who had never even been connected with the Organization.

10. After it had clearly indicated its unfounded hostility

to and prejudice against the Organization, the said House Committee in an obvious attempt to harm the Organization and the contributors thereto and the recipients of its charity, demanded that the Organization deliver to it the names of [fol. 32] its contributors and the names of the recipients of its charity, and the said House Committee served a subpoena therefor on the executive secretary.

11. Despite the fact that the House Committee knew that the executive secretary had custody, possession and control of the books, it served petitioner with a similar subpoena although it knew he did not have custody, possession or control of the books.

12. The executive board of the Organization voted not to authorize the transfer of the custody of the books from its executive secretary to the respondent, and prohibited that transfer. (One of the thoughts was that since the executive secretary had already been served with a subpoena for these books, any transferring of custody, possession or control from the recognized custodian, would obviously appear to be an attempt to evade the subpoena served on the executive secretary.)

13. In addition to his lack of custody, possession or control of the books, petitioner pointed out that among contributors to the Organization were Americans of Spanish descent with families still in Spain, and among the recipients of its charity were Spaniards who also had families in Spain, and that to reveal to this hostile House Committee these names would have exposed these families to reprisals by the Spanish regime, including the definite danger of imprisonment and execution.

14. The Organization and petitioner thereupon sought legal advice and they were advised by a firm of reputable attorneys that the demands and subpoenas of the House Committee were unconstitutional and void. This was an [fol. 33] opinion widely held at the time throughout the country by eminent lawyers and in responsible legal and other quarters (as the Attorney General formally conceded), and it was the opinion held by the dissenting Judge of the Circuit Court of Appeals before whom this issue came on appeal. Two justices of the United States Supreme Court voted to grant petitioner a review.

15. To indicate its good faith and its earnest belief of the pre-judgment and the hostility and the harm intended by the House Committee, the Organization publicly printed a financial statement of its affairs and publicly invited and offered to permit any impartial group of Americans other than this prejudiced House Committee to inspect its records and also invited further investigation by the President's War Relief Control Board.

16. In his appearance before the House Committee and his testimony there, petitioner answered all questions asked of him. He did not refuse to answer any questions.

17. Petitioner at no time intended to act in contempt of the Committee or to commit any offense, and at all times acted in the best of good faith and in accordance with the advice of legal counsel.

18. Despite the fact that petitioner profited in any manner in his connection with the Organization and although he acted according to legal advice and the dictates of his conscience and according to the highest standards of the medical profession in protecting those to whom he owed a duty of trust, respondent was found guilty of wilfully failing to produce records of which he never had custody. (At [fol. 34] the same time an acquittal was ordered by the Court as to that count dealing with conspiracy to commit a wilful default.)

19. On appeal, one of the three Judges agreed with petitioner and deemed the actions of the House Committee utterly unconstitutional. On a petition for review to the United States Supreme Court, a decision was not rendered for some two years and then when review was denied, two Justices of the United States Supreme Court voted to grant petitioner a review.

20. Thereupon petitioner, who had never been charged or convicted of any crime, or any infraction before the Medical Grievance Committee, suffered the indignity, the physical and mental anguish of actual physical imprisonment and confinement for five months.

21. Petitioner was confined in an institution far away from his wife and child, was permitted two visiting hours a month, lost twenty-three pounds during his imprisonment, lost five months away from his practice (amounting to an

actual five months suspension), had to maintain his office in the interim so as not to lose a practice established for some thirty years, and was forced to deplete his savings to continue to maintain his family and his office.

22. Petitioner submitted the foregoing answer in detail in the belief that aside from what he understood to be the lack of legal basis for the charge herein, petitioner doubted whether the Board of Regents or the Medical Committee on Grievances or any other body or person would ever have [fol. 35] filed or entertained these charges against him had they really been aware of the true facts of this situation (none of which came out on the trial of the petitioner on the advice of legal counsel, because the basic issues submitted to the Court and jury were the legality and constitutionality of the subpoena so served upon him).

23. In concluding his answer, petitioner asserted that his conduct was compatible with the highest standards of the medical profession and he seriously doubted whether any member of the Board of Regents or the Medical Committee on Grievances, if similarly associated with a charitable organization, and if similarly faced with the trust and the fate of its contributors and their families, and the trust and fate of the victims aided by the Organization, and their families, would or could have done otherwise in the dictates of good conscience.

VII. After the joinder of issue, and on or about February 15 and April 12, 1951, hearings were held upon said charge before a sub-committee of the Committee on Grievances, whereat petitioner moved to dismiss the petition and charge for lack of jurisdiction and on the other legal bases set forth in his answer. After the motion was denied, a hearing was held at which testimony was adduced, exhibits were introduced, witnesses were heard, and the hearing was finally closed.

VIII. The sole testimony offered in support of the Inspector's charge, was the conviction. At no time was any testimony offered to refute any evidence or any of the exhibits offered by your petitioner or his witnesses.

[fol. 36] IX. Thereafter and on or about April 5, 1951, a report containing findings, a determination and a recommendation, was rendered by said subcommittee of the Com-

mittee on Grievances of the Department of Education of the State of New York. Said report concluded with a recommendation that petitioner's license to practice medicine should be suspended for three months.

X. Thereafter the Secretary of the Committee on Grievances made a certificate to the Board of Regents to the effect that by a vote of six to four, the full Committee on Grievances recommended a suspension of six months and not three months as recommended by the sub-committee that conducted the hearings. Four members had voted for a three months suspension, instead of a six months suspension, according to said certificate.

XI. Thereafter a hearing was held on July 11, 1951 before the Committee on Discipline of the Board of Regents, at which oral argument was presented by counsel for your petitioner and by the Attorney General of the State of New York, and at which your petitioner also made an oral statement.

XII. Thereafter and on or about July 31, 1951, the said Committee on Discipline rendered a twenty-eight page report which concluded as follows:

(a) That the legal issues presented by your petitioner raised a substantial question of law which could only be determined by the Court and that jurisdiction should be taken by the Board of Regents to permit the Court to pass upon said legal issues.

[fol. 37] (b) The said Committee further concluded that an examination of the record and other pertinent material shows no legal evidence to support any finding of conduct on petitioner's part to justify discipline beyond the minimum. Accordingly said Committee stated:

> "We therefore conclude that he should be censored and reprimanded, and no more."

XIII. Because of its bearing on this application, petitioner sets forth a number of excerpts from said report:

> "There remains, however, the major argument advanced by Respondent's counsel, which does raise a substantial question as to the proper interpretation of the words 'a crime' in sub-division 2(b) of Section 6514

of the Education Law. That argument is (1) that the statute applies to a conviction 'without this state' only if the offense is a crime under the New York law, and (2) that contempt of Congress is not such an offense.

"The first branch of this argument finds support by analogy in decisions of the New York courts. We know of no decision, however, which is precisely in point; and, since the question is one of statutory interpretation, a decision interpreting a different statute or instrument in different circumstances cannot finally determine the question."

* * * * * * *

"the Supreme Court of the United States has said that [fol. 38]'no moral turpitude is involved' in violation of the Federal statute under which Respondent has been convicted."

* * * * * * *

"In any event, the various questions discussed above cannot be authoritatively answered until the courts have spoken; and they are at least close enough to require, in our view, that the Board of Regents assert its jurisdiction under the disciplinary statute. A decision by the Board of Regents against its own jurisdiction would remove the questions from consideration by the courts; and we do not believe that they should be so removed."

* * * * * * *

"We have noted above (page 13) that violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude. We find on examination of the record and of the other material that we have examined no legal evidence to support any findings of conduct on Respondent's part (apart from the inherent nature of the crime of which he has been convicted) that would justify discipline beyond the minimum. We therefore conclude that he should be censured and reprimanded, and no

more. We proceed to discuss the grounds of this conclusion."

* * * * * * *

"The issues litigated at the criminal trial were primarily issues of law."

* * * * * * *

"It is clear on the record of the criminal trial as a whole that, the constitutional and legal defense having [fol. 39] been decided as a matter of law against the defendants, and the issues for the jury's consideration being limited as a matter of law as we have noted above, there was no ground on which the jury could properly have acquitted the defendants (except perhaps under the instruction that evidence of good character might be sufficient to create a reasonable doubt)."

* * * * * * *

"It thus appears that (apart from the inherent nature of the crime of which Respondent was convicted, which we have seen to be negative in so far as the imposition of more than minimum discipline is concerned) nothing was adjudicated in the criminal trial which would in itself justify imposition of more than the minimum discipline. We turn, therefore, to a consideration of the other evidence, including evidence (not material in the criminal trial) offered by Respondent here in explanation of the conduct that led to his conviction."

* * * * * * *

"We have noted above that Respondent's motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here. In considering those motives and reasons, as stated in Respondent's Exhibits CC and GG and in Respondent's testimony, we must do so in the light of certain concessions which the Attorney General has made on the present record.

[fol. 40] "There were, first, concessions with regard to the reasonableness of the legal advice which Respondent received from his counsel, that there were valid constitutional and other legal objections to the subpoenas. The Attorney General formally conceded that Respondent 'was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them'; that the opinion on the constitutional question held by Respondent's counsel 'was held by many lawyers and some jurists'; that there were 'expressions in some legal journals' that the subpoenas were illegal; and that such an opinion was held by one of the judges of the Court of Appeals before which the case came up on appeal. Later the Attorney General stated:

'I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part';

and again:

'I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable.'

"Second, as bearing on the motives of Respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney General made the following concession:

[fol. 41] '* * * I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the conduct of the House Committee on Un-American Activities at the time.'

('The Attorney General conceded further that Congressmen were included among the "people of prominence" who held such views, and that there were Congressmen who at that time made speeches "against the activities of (the Congressional Committee), against its procedure and otherwise".')

"The principal reasons given by Respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement [fol. 42] of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad', and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945, asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined by the courts.

"If these views were honestly held and these asser-

tions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are [fol. 43] raised (Sinclair v. United States, supra). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis.

"A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But there is no such evidentiary showing. * * * conjecture cannot take the place of evidence."

* * * * * * *

"Having mentioned grounds of conjecture to the disadvantage of Respondent's position, a proper balance requires that we mention briefly also, by way of example, some of the evidence that tends to support his position. There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by [fol. 44] the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. * * * There is evidence also in Respondent's

Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board, did in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.

* * * * * * *

"We disagree with the Attorney General's position, stated here and elsewhere and reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced.

"Since violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explana- [fol. 45] tion (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that Respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded.

Respectfully submitted, Robert M. Benjamin
John L. Bauer, M. D., Susan Brandeis.

Regents' Committee on Discipline.

July 31, 1951"

XIV. Thereafter and on or about October 18, 1951, petitioner's attorney received by mail, a copy of said

report of the Committee on Discipline, together with a notice that on September 28, 1951 the Board of Regents (which did not hear the evidence or the witnesses or counsel) had accepted and sustained the determination of the Medical Committee on Grievances (which likewise did not hear the evidence or the witnesses or counsel); and had voted to suspend petitioner for six months. (This rejected the detailed and considered report and recommendation of its own Committee on Discipline.)

XV. Petitioner has been informed that such an order of suspension was issued although not yet served against him.

[fol. 46] XVI. Petitioner is informed and believes that the determinaiton of the Board of Regents is final and binding and that the Board of Regents is not expressly authorized by statute to re-hear the matter upon petitioner's application and that the rules of the Board of Regents do not provide for a rehearing.

XVII. Your petitioner is very seriously aggrieved. The finding of guilt against petitioner and the suspension administered to him, are, he submits, without legal basis and are unwarranted, unfair, unjust, illegal and contrary to all the competent and credible evidence adduced upon the hearing, especially since no testimony was presented against petitioner except the foreign conviction. There was no basis or evidence in law or in fact to justify or to sustain the charge or suspension against your petitioner. Upon the entire record, the findings and determination of the Medical Grievance Committee and of the Board of Regents, are erroneous in law and in fact, and said findings, determination and suspension are arbitrary and capricious, made without regard to the law, the evidence and the record. The proceedings were conducted with prejudice to petitioner. Errors of law and fact were committed in said proceedings. Petitioner wishes a review by this Court of all questions mentioned in Section 1296 of the Civil Practice Act.

XVIII. Petitioner is informed that a principal, if not the sole basis of the findings, determination and suspension of the Medical Grievance Committee and Board of Regents, was held by the United States Supreme Court and by other

courts thereafter, to be reversible error as a matter of law. [fol. 47] XIX. Petitioner is informed and believes that he is entitled to review of said determination of the respondent as a matter of right, in accordance with the provisions of Section 6515, subdivision 5, of the Education Law.

XX. In view of the fact that the Committee on Discipline of the Board of Regents found that there were substantial questions of law to be decided by the Court, and further in view of the fact that said Committee on Discipline stated that on the basis of the record nothing but a minimum punishment, namely a censure and reprimand, were warranted, and further in view of the fact that at no time has there been any claim made that the offense of which petitioner was convicted is in any manner connected with the practice of medicine, petitioner requests a stay to permit of judicial determination of all the foregoing. If no stay were granted, the petitioner would be gravely and irreparably injured because he would be suspended for six months and his legal proceedings in the interim would thereby be rendered meaningless, especially because it will take at least six months to determine the issues herein.

XXI. Petitioner seeks review under Section 1296 C. P. A., subdivisions 2 through 7, with the same effect as though he set forth and repeated each of said subdivisions and alleged it was applicable here. Petitioner also specifically raises the questions in subdivisions 6 and 7 of Section 1296, and seeks a determination that there was no competent proof of all the facts necessary to be proved in order to authorize the making of the determination; further that upon all the evidence there was such a preponderance of proof against [fol. 48] the existence thereof, that a verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court triable by a jury, would be set aside by the Court as against the weight of evidence.

XXII. No prior application was made for this order.

Wherefore petitioner prays for a review under Article 78 of the Civil Practice Act of the determination and action of the Board of Regents of the University of the State of New York suspending him for six months; that an order be made staying all proceedings on the part of the respondent,

the Commissioner of Education, their attorneys, agents, servants and employees from enforcing said determination and order; and that a further order be made requiring respondent to file its answer and to make a full and complete return before this Court to the end that this Court on such review, may annul the said determination and order of the Board of Regents; and petitioner seeks such other and further relief as may be proper.

Dated: New York, October 23, 1951.

Edward K. Barsky.

(Sworn to and verified October 23, 1951.)

[fol. 49] Order of Suspension—October 5, 1951

The University of the State of New York

Upon the records, findings and determination of the Medical Committee on Grievances, after due notice and hearing, and pursuant to the vote of the Board of Regents had and taken September 28, 1951; it is

Ordered, That the determination of the Medical Committee on Grievances be accepted and sustained, and that, in compliance with the recommendation of said Committee, medical license No. 14704, issued under date of March 14, 1919, to Edward Barsky, permitting him to practice medicine in the State of New York, and his registration or registrations as a physician, wherever they may appear, be and the same hereby are suspended for a period of six months from the date of service of this order.

In Witness Whereof, I, Lewis A. Wilson, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 5th day of October, 1951.

Lewis A. Wilson, Commissioner of Education.
(Seal.)

[fol. 50] IN SUPREME COURT OF NEW YORK

ANSWER AND RETURN—November 1, 1951

The above named respondent, by the undersigned Attorney General, hereby answers the Petition herein, as follows:

1. Admits the allegations of paragraphs I to V inclusive of the Petition, and also of paragraphs VII, IX, X, XI, XIV, XV, XVI, XIX, XXI and XXII.

2. The answer mentioned in paragraph XI, which purports to state its "substance" at typewritten pages 2-8 of the Petition, is part of Exhibit I copied in the Hearing Minutes. The statement of the Petition is admitted insofar as it is confirmed by the answer, and otherwise is denied.

3. The allegations of paragraph VIII about the testimony on the Hearings are denied. The respects in which the allegations are false can be deduced from the Hearing Minutes which are returned hereby.

4. The twenty-eight page report mentioned in paragraphs XII and XIII, which purports to summarize the same and quote excerpts from it, is returned hereby. The allegations of those paragraphs are admitted insofar as they are confirmed by the report, and otherwise are denied.

5. The allegations of paragraphs XVII, XVIII and XX are denied. However, they tender only issues of law, which are submitted to the courts.

As a further Answer to the Petition, and as a Return of its proceedings herein, the Respondent hereby certifies and [fol. 51] returns the following documents:

A. The stenographic record of Hearing Minutes. These are not physically annexed to this Answer and Return, or to the copy of it served on the Petitioner's attorney, because they are very bulky, about 465 pages, and it is understood that the Petitioner's attorney has a copy.

B. The Exhibits on such hearing, about forty-one in number. These likewise are not physically annexed hereto. Subject to the approval of the courts, there appears to be no necessity for printing the Hearing Minutes or Exhibits. The Respondent stipulates that the originals may be presented to any court to which this proceeding may come, with

the same force and effect as though made parts of a printed record.

C. The report and findings of the Subcommittee of the Committee on Grievances, and the report of the Secretary of such Committee, each dated April 25, 1951. These documents are annexed hereto, marked "Appendix C."

D. The report, dated July 31, 1951, of the Regents' Committee on Discipline. This document is annexed hereto, marked "Appendix D."

E. Resolution adopted by the Board of Regents on September 28, 1951. This document is annexed hereto, marked "Appendix E."

F. Order of the Commissioner of Education, dated October 5, 1951. This document is not physically annexed [fol. 52] hereto, because it is appended to the Petition.

Wherefore, it is hereby prayed that the Petition be dismissed or the determination confirmed.

Albany, November 1, 1951.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for the Respondent, The Capitol, Albany, N. Y.

APPENDIX C TO ANSWER

Report of Findings, Determination and Recommendation

Department of Education, State of New York

Sub-Committee on Grievances

To the Committee on Grievances:

The undersigned, subcommittee of the Committee on Grievances duly designated to hear the charges against Dr. Edward K. Barsky, hereinafter referred to as respondent, pursuant to Section 6515 of the Education Law of the State of New York, and to report its findings, determination and recommendation in respect to the said charges, do hereby, after due deliberation, unanimously report its findings, de- [fol. 53] termination and recommendation as provided by law, as follows:

Record of Proceedings

Petition containing charges verified: April 1, 1948.

Notice of hearing upon charges returnable: April 22, 1948.

Place of hearing: Suite 12-C, Hotel Marguery, 399½ Madison Ave., N. Y. C.

Respondent served with copy of notice of hearing and charges: April 2, 1948.

Answer of respondent as amended verified February 9, 1951 and filed February 9, 1951.

Petitioner appears by Nathaniel L. Goldstein, Attorney General of the State of New York, by Sidney Tratikoff, Assistant Attorney General.

Respondent appears in person and by his attorney, Abraham Fishbein, Esq., 150 Broadway, New York, N. Y.

Hearings held on February 15, 1951, April 12, 1951.

Findings of Sub-Committee

1. Dr. Edward K. Barsky, the respondent herein, graduated from the College of Physicians and Surgeons of Columbia University in February, 1919, and on March 14, 1919, he received license No. 14704 from the New York State Department of Education, which authorized him to practice medicine in the State of New York.

2. Respondent is currently registered to practice medicine with the New York State Department of Education, [fol. 54] from office premises at 54 East 61st Street, in the Borough of Manhattan, County, City and State of New York.

3. Respondent was charged in these proceedings with having been convicted of a crime. The undisputed evidence discloses that the respondent was indicted by the Grand Jury in the District Court of the United States for the District of Columbia, in an indictment which appears to have been filed in the aforesaid court on March 31, 1947. This indictment charged this respondent with the crime of contempt of the House of Representatives' Committee on Un-American Activities, in failing to produce books, ledgers, records and papers in response to a subpoena issued by authority of the House of Representatives of the Congress of

the United States, in a matter pertaining to an investigation then being conducted by the aforesaid Committee. Following a trial on the aforesaid indictment, the respondent was found guilty of the crime charged against him which was a violation of Section 192, Title 2 of the United States Code. On July 16, 1947, the respondent was accordingly sentenced in the aforesaid court to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment for a period of six months in a common jail, and to pay a fine of $500. We conclude that the respondent has been convicted of a crime, in a court of competent jurisdiction, within the purview and meaning of Section 6514, subdivision 2(b) of the Education Law of the State of New York.

4. We are satisfied that the respondent was, in fact, guilty of the crime of which he was convicted. Respondent was the chairman, and one of the active participants in the [fol. 55] activities of the Joint Anti-Fascist Refugee Committee. He personally attended and voted at meetings of this organization held in the latter part of 1945 and early part of 1946, at which time the attitude and policies of the organization towards the Congressional investigation were formulated and determined.

The respondent presented testimony and numerous exhibits in support thereof, which establishes that the Joint Anti-Fascist Refugee Committee engaged in many projects which were ostensibly philanthropic in character. Substantial sums of money were collected by this Committee, which were in a great measure expended upon philanthropic projects, devoted to the relief of Anti-Franco refugees, following the Civil War in Spain. It further appears that the work of the Committee was supported by numerous reputable organizations and individuals between 1942 to at least 1946. It also appears that there were complaints lodged against the Committee by some individuals with the F. B. I. and with the Congressional Committee on Un-American Activities. These complaints suggested that the activities of the Joint Anti-Fascist Refugee Committee might be subversive in character. The Congressional Committee subpoenaed the books and records of the Joint Anti-Fascist Refugee Committee, for the purpose of investigation, and to determine whether the Joint Anti-Fascist Re-

fugee Committee was, in fact, engaged in subversive activities. The failure of the respondent, as well as the other executive members of the Joint Anti-Fascist Refugee Committee, to produce the books and records pursuant to subpoena precluded the Congressional Committee from pursuing its investigation. Because of the respondent's disobedience to the subpoena, he was convicted of contempt [fol. 56] of Congress, as is hereinabove set forth. The books and records of the Joint Anti-Fascist Refugee Committee have never been available for examination and study by the Congressional Committee. We do not feel that we are now concerned, nor would we be able to determine, whether the books and records of that Committee would disclose whether the Committee was completely philanthropic in character, or whether it was engaged in subversive activities.

Ever since 1947, the Committee has been listed as subversive by the Attorney General of the United States. The respondent suggests that his motives, and the motives of his colleagues on the Committee, in refusing to make these books available to the Congressional Committee, were predicated upon a desire to safeguard the life, liberty and welfare of the recipients of the Committee's charity. Unfortunately, the end result of the refusal to produce the books and records by the respondent and his colleagues of the Committee, was that the respondent and others were found guilty of contempt, and the Congressional Committee was frustrated in their efforts to determine the entire facts concerning the activities of the Joint Anti-Fascist Refugee Committee.

We recognize that respondent's difficulties may be partially charged to his having followed the advice of counsel. We cannot, however, completely condone the respondent's attitude at the time of the Congressional investigation. His conduct and that of his colleagues on the Committee did, in fact, thwart the efforts of the Congressional Committee in a matter which was, and is, of serious concern to the government and people of the United States.

[fol. 57] The respondent has actually served a five months period of imprisonment and has thus already sustained some suspension from the practice of medicine. We have

taken this fact into consideration in making our present recommendation. We have also taken into consideration the testimony and letters submitted in support of his character. In the light of all of the foregoing circumstances, we recommend that respondent's license to practice medicine should now be suspended for a period of three months.

Conclusion

We find that the charges against the Respondent, as above found, have been sustained by sufficient legal evidence.

Recommendation

For Respondent's misconduct as above found, we recommend that his license to practice medicine be suspended for three months.

Record

We submit herewith the following:

1. Transcript of stenographic minutes of hearing.
2. Exhibits.

Dated: New York, N. Y., the 25th day of April, 1951.

(Sgd.) Leander H. Shearer, Chairman; Horace E. Ayers, C. Gorham Beckwith.

[fol. 58] Certificate of Secretary

Department of Education, State of New York

Committee on Grievances

To the Board of Regents:

I, the undersigned, Secretary of the Committee on Grievances duly appointed pursuant to the Education Law of the State of New York, do hereby certify:

1. That charges, in writing, were duly preferred and filed against Dr. Edward K. Barsky, a duly licensed physician of the State of New York, hereinafter referred to as respondent, wherein respondent was charged with having been convicted of a crime within the purview of Section 6514, subd. 2(b) of the said Education Law, and a copy of the said

harges with notice of hearing were duly served upon the espondent, and hearing duly had thereon before a subcomittee of the Committee on Grievances which found Dr. Edward K. Barsky guilty of the charges as set forth in its vritten report, containing its findings, determination and ecommendation as presented and filed with the Committee n Grievances.

2. That the findings, determination and recommendation f the said subcommittee on the aforesaid charges against Dr. Edward K. Barsky, the respondent herein, were made he findings, determination and recommendation of the [fol. 59] Committee on Grievances on 25th day of April, 1951 except as may be hereinafter modified, if any, which manimously determined that the respondent was guilty of he charges to the extent above found.

3. That — is recommended to the Department of Educaion by a majority vote of the Committee on Grievances that or respondent's misconduct as hereinbefore found, respondent's license to practice medicine be suspended for a period f six months and that the entire record of the proceedings erein be duly certified by the Secretary, and transmitted to he Board of Regents.

I further certify that the vote of the Committee on Grievances on the said report containing the findings, determination, and recommendation as to the charges against Dr. Edward K. Barsky was as follows and the vote was so recorded:

Record of Vote

Member	Recommendation	Vote
Dr. George C. Vogt	6 months suspension	Guilty
Dr. Horace E. Ayers	3 months suspension	"
Dr. Ralph I. Lloyd	6 months suspension	"
Dr. Leander H. Shearer	3 months suspension	"
Dr. C. Gorham Beckwith	3 months suspension	"
Dr. Edwin A. Griffin	6 months suspension	"
Dr. Frank E. Mallon	6 months suspension	"
Dr. William W. Street	6 months suspension	"
Dr. Nelson W. Strohm	6 months suspension	"
Dr. Clarence P. Thomas	3 months suspension	"

[fol. 60] I further certify that annexed hereto is a true copy of the record and proceedings taken herein, as follows:

1. Transcript of the Minutes.

2. Report, Findings and Recommendation of the Subcommittee.

3. Exhibits.

All of which is respectfully and unanimously submitted.

Dated: 25th day of April, 1951.

(Sgd.) Horace E. Ayers, Secretary

APPENDIX D TO ANSWER

Report of the Regents' Committee on Discipline

The University of the State of New York

State Education Department

To the Board of Regents:

Your Committee on Discipline, appointed pursuant to Chapter 514 of the Laws of 1945, reports as follows in connection with the above entitled case.

On July 11, 1951, in the Regents' Room, Suite 12C, 399½ Madison Avenue, New York, New York, a hearing was ac- [fol. 61] corded Edward K. Barsky, at which he appeared in person and by counsel. Daniel M. Cohen, Assistant Attorney General, represented the State.

Copies of the charge preferred against said Edward K. Barsky and of the findings, determinations and recommendations of the Subcommittee of the Medical Committee on Grievances, and of the Medical Committee on Grievances, are submitted herewith.

Your Committee has examined the record submitted and has given careful consideration thereto and to argument of counsel.

The Medical Committee on Grievances has found that Respondent has been convicted of a crime in a court of competent jurisdiction, within the purview and meaning of subdivision 2 (b) of Section 6514 of the Education Law. The

Subcommittee of the Medical Committee on Grievances which conducted the hearing recommended that Respondent's license be suspended for three months. By majority vote the Medical Committee on Grievances has recommended that Respondent's license be suspended for a period of six months (six members so voting, and the remaining four—including the three members of the Subcommittee—voting for a three months' suspension).

The charge in this proceeding is based on Respondent's conviction in June, 1947, in a jury trial in the District Court of the United States for the District of Columbia, of a violation of Title 2, Section 192, of the United States Code. [1] [fol. 62] The indictment named Respondent and sixteen others, all being members of the Executive Board of the Joint Anti-Fascist Refugee Committee (hereinafter referred to as "the Refugee Committee"), an unincorporated association having its main office in New York City. While the indictment does not so state, Respondent was Chairman of the Refugee Committee.

The introductory portion of the indictment recites that during the time in question the Committee on Un-American Activities of the House of Representatives (hereinafter, and in the indictment, referred to as "the Congressional Committee") was conducting an investigation authorized by House Resolution No. 5 of the 79th Congress into Subversive and Un-American propaganda activities in the

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[1] That Section reads as follows:

"§ 192 *Refusal of witness to testify*

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

United States, and that during that period the Congressional Committee was seeking to obtain access to records of the Refugee Committee upon the matter under inquiry, and issued subpoenas directed to the defendants and to the Refugee Committee requiring the production of such records.

The first count of the indictment, charging a violation of Title 18, Section 88, of the United States Code, charged the defendants with conspiracy to defraud the United States by interfering with a function of its government through preventing the Congressional Committee from obtaining [fol. 63] access to the records of the Refugee Committee and with conspiracy to make willful default of the subpoenas of the Congressional Committee in violation of Title 2, Section 192, of the United States Code. The trial court, at the conclusion of the trial, directed entry of judgment of acquittal on this conspiracy count. [2]

The second count of the indictment, under which Respondent and the other defendants tried with him were convicted, [3] reads as follows:

> "Before the date of April 4, 1946, by authority of the House of Representatives the defendants and each of them were summoned to produce before the Congressional Committee on April 4, 1946, records and papers upon the matter under inquiry, that is to say,

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[2] Neither the full text of the first count of the indictment nor a full account of the disposition of that count by direction of judgment of acquittal appears in the record of the present proceeding. It was, however, agreed by counsel on the hearing before us that we should, in our consideration of the case and the preparation of our report and recommendations, examine, consider and take into account such matter outside of the record of the present proceeding as we should deem relevant, including specifically the record of the criminal case in the District Court of the United States for the District of Columbia (which is referred to in part, but not introduced in full, in the record of the present proceeding).

[3] One of the defendants named in the indictment was separately tried.

all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946.

[fol. 64] "In response to these subpoenas each and all of the defendants appeared before the Congressional Committee in the City of Washington, District of Columbia, on April 4, 1946, but failed to produce the records called for in the subpoenas, as they had power to do, and thereby wilfully made default."[4]

Upon conviction, Respondent was sentenced to imprisonment for six months and to pay a fine of $500. The conviction was affirmed in March, 1948, by the United States Court of Appeals for the District of Columbia, one of the three judges dissenting (*Barsky et al.* v. *United States*, 167 F. 2d 241). A petition for a writ of certiorari was denied by the Supreme Court of the United States in June, 1948 (334 U. S. 843); and petitions for rehearing of this denial were denied in May, 1950, with a notation that Mr. Justice Black and Mr. Justice Douglas were of the opinion the petitions should be granted (339 U. S. 971). Thereupon

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[4] The subpoena served on Respondent was served on January 28, 1946, and differed in several respects from the subpoenas served on the other defendants, referred to in the indictment. For example, it called for the production of records for the calendar years 1944 and 1945 (instead of for the period from January 1, 1945, to March 29, 1946), and called explicitly for the names and addresses of contributors to the Refugee Committee and of recipients of its funds. The subpoena served on Respondent was returnable on January 30, 1946. Respondent appeared pursuant thereto not on April 4, 1946, as did the other defendants, but on February 13, 1946. At the criminal trial, the court instructed the jury that these variances from the facts stated in the indictment were as a matter of law immaterial.

Respondent served his prison sentence, being confined for five months (on the six months' sentence).

Respondent challenges the legal basis of the charge of [fol. 65] which he has been found guilty in this proceeding. We turn first to a consideration of questions raised in this regard.

Challenge to Legal Basis of Charge

Subdivision 2 of Section 6514 of the Education Law authorizes discipline of a physician "upon decision after due hearing . . .

> (b) That a physician has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Respondent's position is that the Federal offense of which he was convicted is not "a crime" within the meaning of this provision.'[5]

We may dispose at the outset of a subsidiary point made by Respondent's counsel, that violation of Section 192 of Title 2 of the United States Code is not "a crime" under the laws of the United States. Counsel's argument based on the omission of this offense from Section 402 of Title 18 of the United States Code, entitled "Contempts constituting crimes," seems to us wholly unpersuasive. Another argument, that Federal crimes must be defined by acts of Congress, and that Section 192 of Title 2 was adopted by joint resolution and not by bill, is in our view without

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[5] Respondent does not challenge his conviction in the United States District Court by seeking to reopen the question of his guilt of the Federal offense of which he was there convicted; nor would there be any basis for such a challenge, since the question under the disciplinary statute is simply whether he was "convicted" not whether he was "guilty" (*cf. Matter of Donegan*, 282 N. Y. 285, 293; compare also other disciplinary provisions of the Education Law, *e.g.*, subdivision 1-a of Section 6911, relating to nursing, where the question is whether "such licensee is guilty of a crime").

[fol. 66] merit.[6] In any event, the question for decision in this proceeding is a question of the correct interpretation of Section 6514 of the Education Law, and we cannot attribute to the New York Legislature an intention to draw any such distinctions as those which these arguments of Respondent's counsel suggest.

There remains, however, the major argument advanced by Respondent's counsel, which does raise a substantial question as to the proper interpretation of the words "a crime" in subdivision 2 (b) of Section 6514 of the Education Law. That argument is (1) that the statute applies to a conviction "without this state" only if the offense is a crime under the New York law, and (2) that contempt of Congress is not such an offense.

The first branch of this argument finds support by analogy in decisions of the New York courts. We know of no decision, however, which is precisely in point; and, since the question is one of statutory interpretation, a decision interpreting a different statute or instrument in different circumstances cannot finally determine the question.

In *Matter of Donegan, supra*, 282 N. Y. 285, an attorney had been convicted in the United States District Court for the Southern District of New York of the crime of conspiracy to use the mails to defraud, a felony under the Federal law; and the Appellate Division had held that disbarment followed automatically under the provisions of the then Sections 88 (subdivision 3) and 477 of the Judiciary Law, providing for automatic disbarment of an attorney "convicted of a felony". The Court of Appeals held that [fol. 67] these statutory provisions were to be construed as applying to conviction of a felony in a Federal court as well as in a court of the State of New York,[7] but limited their

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[6] Legislation adopted by joint resolution, approved by the President, goes through the same legislative process, and has the same force of law, as legislation adopted by bill (IV Hinds' Precedents of the House of Representatives of the United States, Sections 3370-3375).

[7] This construction was reached on the basis of a reference in subdivision 4 of Section 88 to "pardon by the President of the United States . . ."

application to cases where the offense is a felony under the New York law. Stating that the offense of conspiracy to commit a crime is only a misdemeanor under the New York law (282 N. Y. at 287), the Court of Appeals reversed the Appellate Division's order of automatic disbarment.[8] It may be noted, as weakening somewhat the force of this decision as a precedent on the question before us, that the Court of Appeals applied here the doctrine that penal statutes must be strictly construed, whereas the general rule, applicable to the present proceeding, is that a disciplinary statute is not penal (*e.g., Matter of Rouss,* 221 N. Y. 81).[9]

In *People ex rel. Marks* v. *Brophy,* 293 N. Y. 469, a prisoner serving a ten-year term was released on parole at the expiration of five years on condition that if he should, while on parole, commit and be convicted of "a felony either in New York State or any other state," he would forfeit the time served on parole and be compelled to serve the full five-year balance of his original ten-year sentence. After more than three years on parole the prisoner was [fol. 68] convicted, on a plea of guilty in a United States District Court in Tennessee, of the Federal crimes of using the mails to defraud and conspiring to do so, both crimes being felonies under the Federal law; and, after serving his Federal sentence, he was returned to a New York State prison to serve the five-year balance of his New York sentence. In this proceeding on a writ of habeas corpus, the Court of Appeals held that the prisoner had not violated the condition of his parole, and that he had thus not forfeited the time he had spent on parole before his Federal convic-

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[8] The Court of Appeals remitted the case to the Appellate Division for further proceedings under subdivision 2 of Section 88, authorizing discipline of attorneys "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor" (282 N. Y. at 293).

[9] The Court's application of the doctrine of strict construction in *Matter of Donegan* was based on the conclusion "that the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment" (282 N. Y. at 292).

tion. Stating the question to be the meaning and application of the words "a felony, either in New York State or any other state", the Court held that the Federal felonies of which the prisoner had been convicted were not within that meaning. Referring to other cases and statutory provisions bearing out "the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction" (293 N. Y. at 474), the Court said (293 N. Y. at 475):

> ". . . We think consistency requires that the parole agreement signed by this relator in 1935 should be construed so as to require a forfeiture only in the event of relator's conviction of a crime known to our laws as a felony. The crimes adjudged by the Federal courts against this relator (using the mails to defraud and conspiring so to do) are crimes unknown to our State Penal Law and not cognizable at all in our State courts . . ."

It may be noted, again, that since this decision involved a criminal penalty it is not determinative on the question before us.

[fol. 69] But these decisions, even though not determinative, do in our view throw light on the question involved here.[10] In that light we believe that, to come within the

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[10] We do not consider relevant another decision cited by Respondent's counsel, *Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286, dealing with the automatic revocation of a physician's license upon his conviction of a felony, pursuant to subdivision 1 of Section 1264 (now subdivision 1 of Section 6514) of the Education Law. It was there held that automatic revocation of the respondent's license was unauthorized, the felony offense of which he had been convicted in the United States District Court for the Southern District of New York being only a misdemeanor under the New York law; but the decision followed as a matter of course because of the definition of "conviction of felony" in Section 1251 (now Section 6502), referred to in subdivision 1 of Section 1264, as "the conviction of any offense which if committed within the state of New York would constitute a felony under the laws thereof."

meaning of subdivision 2(b) of Section 6514, "a crime" of which a physician is convicted in a court outside this State must bear some relation to "crime" as recognized by the laws of New York.[11] New York, for example, permits marriage between first cousins (see Domestic Relations Law, Section 5). If a physician were convicted of crime in Arkansas because of his marriage there to his first cousin,[12] we would not read Section 6514 as subjecting him to discipline. Recognizing, then, that there must be some relation to the laws of New York, we proceed to inquire into the nature of that relation.

The *Donegan* and *Marks* cases, discussed above, appear to leave this question undecided. In the *Marks* case the Court of Appeals, in the context of the problem then before it, noted that the Federal crimes of using the mails to defraud and conspiring so to do "are crimes unknown to [fol. 70] our State Penal Law." In the *Donegan* case, a disciplinary proceeding against an attorney, also involving conspiracy to use the mails to defraud, the Court noted that the offense of conspiracy to commit a crime is a misdemeanor under the New York law.[13] Thus the *Donegan* decision might appear to take *conspiracy* as a type of crime cognizable by the New York law (without regard to the question whether the object to which the conspiracy is directed would itself be criminal under the New York law) and to conclude that guilt of "conspiracy" as such was

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[11] It is to be noted that subdivision 2(b) of Section 6514 apparently covers conviction not only in Federal courts and in courts of other states but in courts of foreign countries as well.

[12] See Arkansas Statutes, 1947, Sections 55-103, 41-811; *Nations* v. *State*, 64 Ark. 467, 43 S. W. 396.

[13] In view of the broad language of subdivision 2 of the then Section 88 of the Judiciary Law, quoted in footnote 8, it is possible to read the *Donegan* decision as not limiting the Appellate Division to the question of "crime or misdemeanor"; but the language of the Court of Appeals (282 N. Y. at 293): "The judgment of conviction will constitute at least *prima facie* evidence of guilt of the crime charged", makes such a reading difficult.

sufficient; or it may be that (though there is no explicit statement in the opinion to that effect) the result was reached because the particular conspiracy charged involved obtaining money by fraud, though the particular kind of fraud was not cognizable under the New York criminal law.

We turn now to a consideration of the second branch of the argument advanced by Respondent's counsel, that the Federal crime of which Respondent has been convicted is not "a crime" under the New York law. In the light of the earlier discussion, this may be restated as a question whether the Federal crime of which Respondent has been convicted bears a sufficient relation to the criminal law of New York to bring it within the meaning of subdivision 2(b) of Section 6514. Stated either way, the question is apparently to be determined by the provisions of the applicable criminal statutes, Federal and New York (see *People* v. *Olah*, 300 N. Y. 96).

[fol. 71] Obviously, default in the production of subpoenaed documents before the Congress or a Congressional committee is not a violation of any provision of the New York law. There is, however, a provision of the New York Penal Law making default in the production of documents before the Legislature or any committee thereof a misdemeanor.[14] Assuming for the moment that the two statutes are substantially similar in terms, the question is whether this is sufficient to bring the Federal offense within the meaning of subdivision 2(b) of Section 6514 of the Education Law.

If the interpretation of the *Donegan* case first suggested above is correct (namely, that guilt of conspiracy was suf-

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[14] This provision of the Penal Law reads as follows:

"§ 1330. Refusing to Testify

A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor."

ficient there, without regard to the object of the conspiracy), then it is strongly arguable here that the fundamental type of crime in both jurisdictions is default in the production of documents before a legislature or legislative committee, and that conviction of the Federal offense of this type is sufficient here. On this analysis there would appear to be a strong likeness to a case of conviction in a Federal court of the crime of evasion of the Federal income tax law; and we have little doubt that such a conviction would be ground for discipline under the New York disciplinary statute.

There is, it should be added, an argument tending against the application of the *Donegan* doctrine in the present pro- [fol. 72] ceeding. Clearly, the object of the *Donegan* conspiracy was morally wrong. On the other hand, the Supreme Court of the United States has said that "no moral turpitude is involved" in violation of the Federal statute under which Respondent has been convicted.[15]

(Section 102 of the Revised Statutes, here referred to, was the predecessor of Section 192 of Title 2 of the United States Code.)

It is arguable from *United States* v. *Murdock*, 290 U. S. 389 at 396-7, discussing the *Sinclair* case, that the language quoted in the text applies only to refusing to answer questions and not to "willfully making default" in appearing or (as here) in producing documents; but we believe that it applies here also (see page 16, *infra*, and *Fields* v. *United*

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[15] *Sinclair* v. *United States*, 279 U. S. 263 at 299:

> "There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. . . ."

States, 164 F. 2d 97, cited in *Barsky et al.* v. *United States*, 167 F. 2d 241 at 251).

We have assumed above that Section 192 of Title 2 of the United States Code and Section 1230 of the New York Penal Law are substantially similar in terms. Respondent's counsel argues, against this assumption, that the Penal Law provision requires explicitly that a defendant have the documents "in his possession or under his control"; that the Federal statute was, in the criminal case here, held to be applicable though none of the defendants individually had custody or control of the subpoenaed documents;[16] that [fol. 73] the Federal statute has thus been given a judicial construction which would not be given to the New York statute; and that the crimes are thus different. We note only that there is no way for us to forecast whether the New York courts would hold in a case like the present one that defendants had "control" within the meaning of the New York statute, since so far as we know the question has never been judicially determined.

In any event, the various questions discussed above cannot be authoritatively answered until the courts have spoken; and they are at least close enough to require, in our view, that the Board of Regents assert its jurisdiction under the disciplinary statute. A decision by the Board of Regents against its own jurisdiction would remove the questions from consideration by the courts; and we do not believe that they should be so removed.[17]

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[16] This point, which was one of those on which Respondent and the other defendants relied before the Congressional Committee as well as in the criminal court, was authoritatively decided against their contention by the Supreme Court of the United States (Justices Black and Frankfurter dissenting) in a companion criminal case involving the one member of the Executive Board of the Refugee Committee, named in the indictment, who was not tried with the other defendants but separately tried (*United States* v. *Fleischman*, 339 U. S. 349).

[17] See Benjamin, *Judicial Review of Administrative Adjudication*, 48 Columbia Law Review 1, 16.

We therefore recommend that the finding of the Medical Committee on Grievances that Respondent has been convicted of a crime in a court of competent jurisdiction, within the purview and meaning of subdivision 2(b) of Section 6514 of the Education Law, be approved; and we turn now to a consideration of the measure of discipline.

The Measure of Discipline

While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline beyond the statutory minimum of censure and reprimand must, we believe, be based either on [fol. 74] the inherent nature of the respondent's violation of the disciplinary statute or on an evedentiary showing that the respondent's conduct justifies more than the minimum discipline.

We have noted above (page 13) that violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude. We find on examination of the record and of the other material that we have examined no legal evidence to support any finding of conduct on Respondent's part (apart from the inherent nature of the crime of which he has been convicted) that would justify discipline beyond the minimum. We therefore conclude that he should be censured and reprimanded, and no more. We proceed to discuss the grounds of this conclusion.

Before discussing the conduct of Respondent and the other members of the Executive Board of the Refugee Committee that led to their indictment, trial and conviction, it will be useful to consider what was litigated and adjudicated at the criminal trial and what was excluded from the issues there litigated.

The issues litigated at the criminal trial were primarily issues of law. The only substantially disputable issues of fact, namely, whether the Congressional Committee had before it sufficient information to justify its issuance of the subpoenas, and whether the documents subpoenaed were pertinent to its inquiry, were heard by the trial judge outside the presence of the jury; and, under his ruling as to the nature of the issues, the evidence was limited to such informa-

ol. 75] tion as the Congressional Committee actually had
fore it.[18] Deciding that the subpoenas were validly
sued, the trial judge also decided adversely to the defend-
its constitutional issues raised by them as to the authority
id operation of the Congressional Committee, and a legal
sue raised by them as to their not individually having had
stody or control of the records of the Refugee Commit-
e.[19] The trial judge decided also, in accordance with the
ctrine of *Sinclair* v. *United States*, *supra*,[20] that the word
willfully", as used in the statute, means deliberately and
tentionally, *i. e.*, not inadvertently or accidentally; he in-
ructed the jury:

> ". . . Thus, the motive of the defendant in failing to comply with the subpoena and his reason for such failure are not material, so long as you find that he did so intentionally and deliberately."

On the record before the jury there was no doubt that the
ilure of the defendants to produce the documents before
ie Congressional Committee was "willful" within this in-
ruction. The trial judge also instructed the jury:

> "The nature of the activities of the defendants, or of the organization with which they were connected, is not an issue in this case, and it is your duty entirely to disregard any speculation on that subject. . . ."

een decided as a matter of law against the defendants, and
fol. 76] It is clear on the record of the criminal trial as a
hole that, the constitutional and legal defenses having

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[18] Thus the defendants were not permitted to produce
vidence to dispute or explain the information which the
ongressional Committee had received or to attempt to es-
blish what the defendants contended were the true facts
ith respect to the Refugee Committee's operations; and
nly one of the witnesses who had testified before the Con-
ressional Committee was produced for cross-examination
y the defendants.

[19] See footnote 16.

[20] See footnote 15.

the issues for the jury's consideration being limited as a matter of law as we have noted above, there was no ground on which the jury could properly have acquitted the defendants (except perhaps under the instruction that evidence of good character might be sufficient to create a reasonable doubt).

For our present purposes, this account of the issues litigated and not litigated at the criminal trial comes down to the following essentials: There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient. There was thus adjudication that, without legally sufficient justification, the defendants had intentionally and deliberately failed to produce the subpoenaed records. There was, at the same time, a directed judgment of acquittal on the first (conspiracy) count of the indictment,[21] on the ground that sufficient evidence had not been introduced to permit the case to go to the jury on that count.

It thus appears that (apart from the inherent nature of the crime of which Respondent was convicted, which we have seen to be negative in so far as the imposition of more than minimum discipline is concerned) nothing was adjudi- [fol. 77] cated in the criminal trial which would in itself justify imposition of more than the minimum discipline. We turn, therefore, to a consideration of the other evidence, including evidence (not material in the criminal trial) offered by Respondent here in explanation of the conduct that led to his conviction.

The Refugee Committee was organized in 1942 as the result of a "merger in part" of three earlier organizations with some or all of which members of its Executive Board, including Respondent, had been actively associated. The announced purpose of the Refugee Committee was the furnishing of relief to Spanish Republican refugees from the Franco regime in Spain and members of the International

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[21] Summarized at pages 3 and 4, *supra*.

Brigade which had fought in Spain on the anti-Franco side. As a relief organization it was licensed by the President's War Relief Control Board, and as a charitable organization it was accorded tax-exempt status by the Treasury Department. It raised large sums of money in the United States through various means including meetings and street-corner solicitation. It expended large sums abroad, principally in France, Mexico, North Africa and Portugal, and much smaller sums in the United States for "legal aid, visas, transportation and rehabilitation". The relief furnished included cash relief, relief in kind, shelter, and in some instances the organization of hospitals, rest homes and schools; and transportation was furnished to countries, principally Mexico, where the refugees would be permitted to settle.

Apparently the first approach by the Congressional Committee to the Refugee Committee was in November, 1945. On November 12 a representative of the Congressional Committee called at the Refugee Committee's office [fol. 78] and asked for a list of the names of contributors with the amount of each contribution and a list of the Refugee Committee's expenditures by name and amount, for the preceding twelve months. On November 20 this call was followed up by a letter from the Chief Counsel of the Congressional Committee to Respondent as Chairman of the Refugee Committee. On November 27 Respondent replied that the Refugee Committee, under its license issued by the President's War Relief Control Board, made periodic reports to the Board, and suggested that the Board would make these available to the Congressional Committee. On December 8 or 11 [22] the Chief Counsel of the Congressional Committee wrote again, stating that the Congressional Committee desired to make a preliminary investigation of the Refugee Committee "to determine whether or not this Committee is interested in your activities."

On December 14, 1945, a Congressional Committee subpoena dated December 4, addressed to "Helen R. Bryan,

[22] The record is not clear as to the date of this letter; conceivably there were two similar letters on December 8 and December 11.

Executive Secretary or Doctor Edward Barsky, Chairman" of the Refugee Committee, was served on Helen R. Bryan. It called for production before the Congressional Committee on December 19 of "all books, records, papers and documents showing all receipts and disbursements of money by the said Committee, or on its behalf, and all letters, memoranda or communications from, or with, any person or persons outside of the United States." On the same day, December 14, 1945, the Executive Board of the Refugee Committee held a meeting, the minutes of which recite that the Executive Board considered that the Refugee Commit- [fol. 79] tee's operations were not within the Congressional Committee's field of investigation and that the Congressional Committee's demands were unwarranted, and thereupon adopted a resolution instructing its Chairman and Executive Secretary to advise with competent lawyers and to take any additional steps necessary to protect the rights of the Refugee Committee. On December 15 the Refugee Committee wrote to Chief Counsel of the Congressional Committee reporting, with a statement of reasons substantially as recited in these minutes, that the Executive Board, "after considering the request to investigate the records of this organization, finds that it is not possible to accede to this request." Thereafter, on January 24, 1946, Helen R. Bryan, the Executive Secretary, appeared before the Congressional Committee in response to the subpoena (her appearance having been adjourned to that date), but failed to produce the subpoenaed records.[23]

On January 28, 1946, Respondent as Chairman of the Refugee Committee was served with another and broader subpoena, dated January 25 and returnable January 30, for the production of Refugee Committee records. It was for his failure to produce the records in response to this subpoena on the adjourned return date of February 13, 1946, that Respondent was convicted (see footnote 4). Meanwhile, Respondent and other officers of the Refugee

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[23] It appears that Helen R. Bryan was not prosecuted for this default; but she was prosecuted for default on April 4, 1946, of another subpoena later served on her, and was convicted (see *United States* v. *Bryan*, 339 U. S. 323).

Committee had, on February 7, written to the Chairman of the Congressional Committee a long letter explaining the [fol. 80] Refugee Committee's position (Respondent's Exhibit CC in this proceeding); and on February 11 the Executive Board of the Refugee Committee had held a further meeting at which it had instructed Respondent as Chairman not to produce the subpoenaed records. On his appearance before the Congressional Committee on February 13, Respondent submitted a written statement of reasons for not producing the subpoenaed records, which is Respondent's Exhibit GG in this proceeding.

We have noted above that Respondent's motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here. In considering those motives and reasons, as stated in Respondent's Exhibits CC and GG and in Repondent's testimony, we must do so in the light of certain concessions which the Attorney General has made on the present record.

There were, first, concessions with regard to the reasonableness of the legal advice, which Respondent received from his counsel, that there were valid constitutional and other legal objections to the subpoenas. The Attorney General formally conceded that Respondent "was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them"; that the opinion on the constitutional question held by Respondent's counsel "was held by many lawyers and some jurists"; that there were "expressions in some legal journals" that the subpoenas were illegal; and that such an opinion was held by one of the judges of the Court of Appeals before which the case came up on appeal. Later the Attorney General stated:

> [fol. 81] "I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part";

and again:

> "I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable."

Second, as bearing on the motives of Respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney General made the following concession:

> ". . . I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the conduct of the House Committee on Un-American Activities at the time." [24]

The principal reasons given by Respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel [fol. 82] that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) [25] the Congressional Committee was au-

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[24] The Attorney General conceded further that Congressmen were included among the "people of prominence" who held such views, and that there were Congressmen who at that time made speeches "against the activities of [the Congressional Committee], against its procedure and otherwise."

[25] House Resolution No. 5 of the 79th Congress, 1st Session, provided:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in

thorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its "regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad", and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their record, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper state-[fol. 83] ment emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945, asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined by the courts.

If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which

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the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

such legal questions are raised (*Sinclair* v. *United States, supra*). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis.

A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But [fol. 84] there is no such evidentiary showing. It may be that some of those connected with the Refugee Committee, perhaps Respondent among them, had Communist affiliations, and it may be that through them the Refugee Committee was led into some unspecified subversive activity; but there is no legal evidence to support these hypotheses, and conjecture cannot take the place of evidence.

There is, it should be noted, evidence in the record, and reliance on that evidnece in the findings of the Medical Committee on Grievances, that the Refugee Committee had been listed as Communist in the list furnished by the Attorney General of the United States to the Loyalty Review Board of the United States Civil Service Commission under the provisions of Part III, Section 3, of Executive Order No. 9835. After the hearing below and the determination of the Medical Committee on Grievances, the Supreme Court of the United States reversed an order of the District Court dismissing a complaint by the Refugee Committee in an action by it for declaratory and injunctive relief (*Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General*, 341 U. S. 123), some of the majority justices going on the ground that a determination of this kind could not constitutionally be made without a hearing and opportunity to offer proof and disproof. In view of this de-

cision, no evidentiary weight can be given in the present proceeding to the listing by the Attorney General.[26]

Having mentioned grounds of conjecture to the disadvantage of Respondent's position, a proper balance requires [fol. 85] that we mention briefly also, by way of example, some of the evidence that tends to support his position. There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. Dr. Joy testified also that, of the Spanish Republican refugees concerned, only a small proportion were Communists. There is evidence also in Respondent's Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board did in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.[27]

There is ground also for conjecture, favorable to Respondent's position, as to how the situation eventuating in

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[26] Indeed it would appear that even the dissenting justices would deny the right to use the listing in a proceeding such as this, since their dissent was based in part on the ground that the listing in itself had no legal effect (341 U. S. at 202 *et seq.*).

[27] This appears from an examination of House Report No. 2233, 79th Congress, 2nd Session, a report of the Congressional Committee, dated June 7, 1946, which was introduced in evidence before the judge in the criminal case. The material furnished to the President's War Relief Control Board did not include the names of contributors or the recipients of relief.

the criminal trial may have arisen. It appears from testimony in the criminal trial by Congressman Wood, Chair-[fol. 86] man of the Congressional Committee, that the Congressional Committee had received complaints about the Refugee Committee, most of which "simply complained that they engaged in political propaganda." Since the Refugee Committee was engaged in raising money for the relief of Spanish Republicans, it is natural that some of its literature, and some of the speeches at meetings and on street corners, should have been anti-Franco and pro-Spanish Republican; and indeed some of the literature submitted by Respondent in this proceeding (including Respondent's Exhibit D, referred to above) is clearly of that character. It may well be that this might have been thought to be a violation of the condition of the Refugee Committee's license from the President's War Relief Control Board that it should engage solely in relief and not in political action or propaganda; and there is some indication that the President's War Relief Control Board concerned itself with this question, though the Refugee Committee's license was not revoked. But assuming that such literature and statements are to be considered propaganda (rather than an incident of fund-raising), there is no showing that it was un-American or subversive propaganda, since the official position of the United States was then anti-Franco.

In summation before the Subcommittee of the Medical Committee on Grievances, the Attorney General said:

> "I would be remiss if I would by silence indicate my acquiescence in the suggestion that because now you are given some evidence of good work, that you must necessarily conclude that all that this committee did was good. It would be just as unfair and improper for [fol. 87] you to arrive at that conclusion as it would be to arrive at a conclusion that what they did was bad or subversive or un-American or Communistic or anything you please. I tell you candidly and honestly, I have no real evidence of the actual workings of this organization and whether they were or were not Communistic in their activities in part—obviously they were not in whole. But the fault of being unable to make a fair and adequate determination of the true

character of this organization does not lie at the doorstep of anyone, more than it lies on the doorstep of Dr. Barsky and his colleagues."

We agree that it is impossible to reach a conclusion from the record as to what all of the Refugee Committee's activities were. We disagree with the Attorney General's position, stated here and elsewhere and reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced.

Since violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand: [fols. 88-91] and we therefore recommend that Respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded.

Respectfuly submitted, Robert M. Benjamin, John L. Bauer, M. D., Susan Brandeis, Regents' Committee on Discipline.

July 31, 1951.

APPENDIX E TO ANSWER

Resolution of the Board of Regents

ADOPTED—September 28, 1951

Upon consideration of the report of the Regents Committee on Discipline, made in accordance with the provisions of chapter 514 of the Laws of 1945, it was

Voted, That the determination of the Medical Committee

on Grievances in the matter of the application for the revocation of the medical license heretofore granted to Edward Barsky, New York City, be accepted and sustained; that, in compliance with the recommendation of said Committee, medical license No. 14704, issued under date of March 14, 1919, to said Edward Barsky, permitting him to practice medicine in the State of New York, and his registration or registrations as a physician, wherever they may appear, be suspended for a period of six months from the date of service of the order effecting such suspension; and that the Commissioner of Education be empowered and directed to execute, for and on behalf of the Board of Regents, all orders necessary to accept the determinaiton of said Committee on Grievances and to carry out the terms of this vote.

[fol. 92] In New York Supreme Court, Appellate Division, Third Judicial Department

[Title omitted]

Notice of Appeal to Court of Appeals—May 27, 1952

Sirs:

Please take notice that pursuant to leave to appeal to the Court of Appeals granted by an order of the Appellate Division of the Supreme Court, Third Judicial Department entered in the office of the Clerk of said Court on May 22, 1952, the above named petitioner hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on May 16, 1952 and filed and entered in the office of the Clerk of Albany County [fol. 93] on May 19, 1952, which order confirms the determination of the respondent, the Board of Regents of the State of New York, dated on or about September 28, 1951, suspending petitioner's medical license and permission to practice medicine in the State of New York for six months, and

this appeal is taken from the whole of said order and from each and every part thereof.

Dated: New York, May 27, 1952.

Yours, etc., Abraham Fishbein, Attorney for Petitioner, 150 Broadway, New York City.

To: Clerk of Albany County, Albany, New York. Honorable Nathaniel L. Goldstein, Attorney General of the State of New York, Department of Law, Albany, New York. (Henry S. Manley, Esq., Assistant Attorney General.)

[fol. 94] In New York Supreme Court, Appellate Division, Third Department

Present: Honorable Sydney F. Foster, Presiding Justice; Honorable Christopher J. Heffernan, Honorable O. Byron Brewster, Honorable Francis Bergan, Honorable William H. Coon, Associate Justices.

[Title omitted]

Order Granting Leave to Appeal—May 22, 1952

Petitioner having moved for leave to appeal to the Court of Appeals from the decision of this Court dated May 7, 1952, and from the final order entered thereon in the office of the Clerk of this Court on May 19, 1952, and for a stay, [fol. 95] and respondent having waived service and not having opposed the motion, now

Upon reading and filing the notice of motion dated May 9, 1952, the affidavit of Abraham Fishbein, sworn to May 9, 1952, the record, briefs, and said decision and order, and due deliberation having been had, and upon the written decision of this Court dated May 14, 1952, and it appearing to the Court that a question of law is involved which ought to be reviewed by the Court of Appeals, it is hereby

Ordered that petitioner's motion for leave to appeal to the Court of Appeals and for a stay, is hereby granted without costs, and petitioner is hereby granted leave to appeal to the Court of Appeals from the decision of this Court

dated May 7, 1952 and from the final order entered thereon in the office of the Clerk of this Court on May 19, 1952, and this Court certifies that a question of law is involved which ought to be reviewed by the Court of Appeals, and it is further

Ordered that the stay of petitioner's suspension herein is hereby continued until the commencement of the next term of the Court of Appeals.

John S. Herrick, Clerk.

Entered May 22, 1952.

[fol. 96] In New York Supreme Court, Appellate Division, Third Department

[Title omitted]

Order Confirming Determination of Board of Regents—May 16, 1952

The above entitled proceeding having duly come on before this Court at its term in March, 1952, and having been argued, and due deliberation having been had, and this Court having rendered decision at its present term, it is hereby

[fol. 97] Ordered, on the authority of Matter of Miller and Auslander v. Regents, 279 App. Div. 447, the determination of the Board of Regents is unanimously confirmed, without costs.

(S.) John S. Herrick, Clerk.

Entered 5/16/52.

In New York Supreme Court, Appellate Division, Third Judicial Department

Decision by Appellate Division—May 7, 1952

This is a review pursuant to Article 78 of the Civil Practice Act suspending petitioner's license for a period of six months.

Petitioner is a duly licensed physician. He was charged by the Committee on Grievances of the Department of Edu-

tion of the State of New York with having been convicted a crime in a court of competent jurisdiction within the eaning and purview of subdivision 2(b), of Section 6514, ols. 98-99] of the Education Law, in that petitioner had en convicted in the United States District Court for the istrict of Columbia of a violation of Title 2, Section 192 of e United States Code, commonly known as contempt of ongress.

The questions presented on this review are the identical uestions passed upon by this Court in the Matter of the pplication of Jacob Auslander and Louis Miller, — App. iv. —.

On the authority of the former case, determination of the oard of Regents unanimously confirmed, without costs.

Present—Foster, P. J.; Heffernan, Brewster, Bergan and oon, JJ.

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

Abraham Fishbein, being duly sworn, deposes and says hat he is the attorney for the petitioner-appellant herein.

No opinion in writing was handed down by the Court below.

Abraham Fishbein.

Sworn to before me this 12th day of June, 1952. Joseph Goldberg, Notary Public, State of New York, Qualified in New York County, Commission expires March 30, 1954. (Seal.)

[fol. 100] IN COURT OF APPEALS

In the Matter of the Application of DR. EDWARD K. BARSKY, Petitioner-Appellant, for a Review under Article 78 of the Civil Practice Act, of the Determination of THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Suspending Petitioner's Medical License and Permission to Practice Medicine in the State of New York for Six Months, Respondent-Appellee

In the Matter of the Application of JACOB AUSLANDER, Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondent; Reviewing and Annulling the Determination of Respondent in Suspending the Petitioner's License to Practice Medicine in This State, as a Physician for Three Months. (Also, Matter of Louis Miller v. Same)

OPINION, DESMOND, J.:

These are proceedings, brought, under Article 78, C. P. A., to review determinations of respondent Board of Regents, suspending for certain periods the medical licenses of petitioners Barsky and Auslander, and censuring and reprimanding petitioner Miller. In each instance the Board found authority for its action in Section 6514, subd. 2(b) of the Education Law, which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime". The question on this appeal is as to the mean-[fol. 101] ing and application of that statute.

Each of the petitioners-appellants is a physician licensed to practice in this state. All three were members of the executive board of The Joint Anti-Fascist Refugee Committee, a voluntary association which functioned during the Second World War and immediately thereafter (see the brief statement of its history and aims, in *Anti-Fascist Committe* v. *McGrath*, 341 U. S. 123, at pp. 130, 131). All three were indicted in the United States District Court for the District of Columbia for, and all were, after a jury trial

in that court, convicted of, the misdemeanor of contempt of Congress, under Title 2, Section 192, of the United States Code, in that each of them failed to obey a subpoena requiring him to produce before a Congressional Committee, the financial books and records of The Joint Anti-Fascist Refugee Committee. Each was sentenced to a fine and to imprisonment. The judgments of conviction were affirmed on appeal (*Barsky et al.* v. *United States,* 167 Fed. 2d 241), certiorari was twice denied by the Supreme Court (334 U. S. 843; 339 U. S. 971), and each petitioner paid his fine and was imprisoned. Then followed the charges with which we deal here.

We consider that, in these records on appeal, there are no controlling facts other than those above summarized, since the voluminous testimony before the Regents as to the character and purposes of the Joint Anti-Fascist Refugee Committee, and as to the motives of these appellants, could not change the admitted fact of their conviction. From the record it is clear that each petitioner has, in fact, "been convicted in a court of competent jurisdiction * * * without this state, of a crime" (Education Law, Sec. 6514, [fol. 102] subd. 2b). Petitioners, however, make these arguments: first, that the statutory language applied only to such offenses as are crimes under New York law, and that contempt of Congress (Section 192, Title 2, U. S. C.) is not a crime under any statute of this state; second, that the legislative intent of Section 6514, subd. 2(b), is to authorize disciplinary action for such offenses only as involve moral turpitude, or are related to professional ability or conduct, and, third, that the Regents imposed unwarranted punishment, and took into account prejudicial matter in fixing the penalties.

There is nothing in Section 6514, subd. 2b, which says that, in order to serve as a predicate for action thereunder, the "crime" must be one specifically forbidden as such by a New York penal statute. Indeed, a directly opposite idea is expressed in the language: "convicted in a court of competent jurisdiction, either within or without this state, * * *". Such language is too plain to permit construction by addition of unexpressed qualifications or exceptions (*Matter of Rathscheck,* 300 N. Y. 346, 350). Petitioners,

however, argue that such decisions as *Matter of Donegan*, 282 N. Y. 285; *People ex rel. Marks* v. *Brophy*, 293 N. Y. 469; *Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286, and *Matter of Garson* v. *Wallin*, 304 N. Y. 702, mean that the New York courts construe such statutes as Section 6514, subd. 2b, as authorizing penalties for such offenses only as are made criminal, if committed in this state, by our own laws. As to the Donegan, Marks, Tonis and Garson cases, each had to do with the imposition of stringent additional penalties, on, and solely because of, conviction of a "felony". Donegan, Marks, Tonis and Garson had each fallen afoul of a foreign statute which made certain conduct a [fol. 103] felony which was either a misdemeanor in New York, or not cognizable at all under our domestic statutory definitions and classifications of crimes. Indeed, this court, as to Donegan (see p. 293 of 282 N. Y.) made it clear that it was not denying the Appellate Division's *discretionary* power to deal with him as one guilty of a "crime" (former Section 88, subd. 2, now Section 90, subd. 2, Judiciary Law). In the statute now before us (Education Law, Sec. 6514, subd. 2b) the Legislature has authorized disciplinary action against one convicted, not of a "felony", but of a "crime". Traditionally as well as by express statute (Penal Law, Sec. 2), the word "crime" in New York Law includes misdemeanors as well as felonies, and so it is patent that these petitioners have "been convicted, in a court of competent jurisdiction, * * * without this state, of a crime". As we remarked in *People ex rel. Marks* v. *Brophy*, supra, 293 N. Y. at pp. 474-5, it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction. But public policy is made by the Legislature (see *Matter of Rhinelander*, 290 N. Y. 31, 36) and the policy of this section of the Education Law cannot be misunderstood. It does not require the imposition of any particular penalties, but leaves it to the Regents to decide on the measure of discipline, up to the extreme limit of license revocation.

We do not find it necessary to rely on an additional ground, put forward in the report of the Regents' Committee on Discipline in these proceedings for holding that petitioner's conviction in the District of Columbia was for

a "crime", as that word is used in the Education Law section. The Committee on Discipline noted that New York does have, in Section 1330, Penal Law, a provision making it a misdemeanor, wilfully to refuse to produce material [fol. 104] and proper documents before a committee of our *State Legislature*. That enactment, the Regents' Committee thought, is so similar in meaning to Section 192, Title 2, United States Code, that one violating the latter is really committing about the same offense as is made criminal by our Section 1330. Be that as it may, we construe Section 6514, subd. 2b, of the Education Law as it plainly reads, that is, to authorize discipline by the Regents in the event of a conviction of a physician of a crime in any court of competent jurisdiction. Section 1330, supra, does, however, have this significance at this point: it illustrates, at least, that making a criminal offense out of a refusal to obey a legislative subpoena is in line with New York public policy, as well as that of the Federal government.

Appellants suggest that a literal construction of Section 6514, subd. 2b, will empower the Board of Regents to destroy a person, professionally, solely on a showing of the commission by him in some other state (or country) of an act which we in New York consider non-criminal, or even meritorious. Two answers are available to that: first, some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases; and, second, the offense here committed, contempt of Congress, is no mere trivial transgression of an arbitrary statute.

Turning to appellants' second main argument, we consider it impossible to read into Section 6514, subd. 2b, supra, a condition or qualification that, to justify professional discipline, the crime must be one involving moral turpitude (see, as to there being no moral turpitude in this offense, *Sinclair* v. *U. S.*, 279 U. S. 263, 299), or one related to the profession itself. The Legislature knows how to [fol. 105] state such limitations when it so desires (see, for instance, present Education Law, Section 7406, subd. 1, as to certified public accountants, and, as to physicians, compare former Public Health Law, Section 161, with present Education Law, Section 6502). Nor is this an attempt to

"enforce the criminal laws of the United States" (*People* v. *Welch*, 141 N. Y. 266, 275). We are enforcing our own statute, of not uncertain meaning, which simply empowers the Regents to impose a penalty upon any physician who has been convicted of a crime in any competent court anywhere. Stringent as it is, that statute needs no cutting down, for constitutionality's sake. It is no argument against the validity of this statute that it considers a criminal conviction anywhere as a showing of unfitness, for "it is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character" (*Hawker* v. *New York*, 170 U. S. 189, 196). A professional license is a privilege from the state, and the state can attach to its possession conditions onerous and exacting. The special equities of individual cases can be reflected in variety of punishment, as was done here, but the choice among such varieties is for the Board, not the courts (*Matter of Sagos* v. *O'Connell*, 301 N. Y. 212).

Somewhat similar to the argument, supra, that moral turpitude must be shown, is the contention that the Regents acted arbitrarily in acting on the Federal conviction alone, without regard to the moral right or wrong of what petitioners actually did, that is, refuse to obey legislative subpoenas, and without regard to their motives. Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and pur-[fol. 106] poses of these petitioners, are presumed to have taken all those things into account in fixing the penalties.

As to the assertions, by appellants, that the Regents dealt too severely with them, or that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such questions (*People ex rel. Masterson* v. *French et al.*, 110 N. Y. 494, 500; *People ex rel. McAleer* v. *French, et al.*, 119 N. Y. 502, 507; *People ex rel. Greenbaum* v. *Bingham*, 201 N. Y. 343, 347; *People ex rel. Morrissey* v. *Waldo*, 212 N. Y. 174, 179; *People ex rel. Regan* v. *Enright*, 240 N. Y. 194, 198, 199; *Matter of Sagos* v. *O'Connell*, 301 N. Y. 212, 215; Benjamin, Report to the Governor on Administrative

Adjudication, Vol. 1, pp. 170, 217; see *Jaffe* v. *State Board*, 135 Conn. 339, 352, 353, 354; *Williams* v. *New York*, 337 U. S. 241, 246 et seq.). *Matter of Tompkins* v. *Board of Regents*, 299, N. Y. 469, does not announce or apply any different rule as to court review of administrative discretion in measuring out discipline against physicians. In the *Tompkins* case, we reversed an Appellate Division order annulling a Regents' determination because the Appellate Division had exceeded its powers in so doing. Sending the whole matter back to the Regents, because of that error of law, we reminded the Board of the physician's fine record, etc., and suggested that such factors should be significant to the Board in again "exercising its broad discretion to frame the appropriate discipline, for the offense and for the offender". In that same connection, however, in Tompkins, we made it entirely clear that "the exercise of that discretion is beyond our power to review." Had [fol. 107] we not there found an error of law (not as to punishment but as to the Appellant Division's unwarranted annulment order) we could not, in the Tompkins case, have done other than affirm. In the present case there is no error of law, and so no basis for any interference by us.

The orders should be affirmed.

Opinion to Reverse

Fuld, J. (dissenting):

It is "the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction." (People ex rel. Marks v. Brophy, 293 N. Y. 469, 474.) That public policy is grounded in a natural and humane abhorrence of heaping added domestic penalties upon one convicted of a crime in a foreign jurisdiction. I cannot, therefore, agree with the court's conclusion that the license of a physician may be suspended or revoked by the Regents—pursuant to section 6514, subdivision 2(b), of the Education Law—because of a conviction of a crime "without the state," when the underlying act is not of a character recognized as criminal by the laws of this state, when it has been held by the courts of the conviction jurisdiction not to involve moral turpitude and when there is no evidence reflect-

ing adversely on the licensee's qualifications to practice his profession.

Appellant Barsky and a number of others, all members of the Executive Board of the Joint Anti-Fascist Refugee Committee, were convicted under title 2, section 192, of the United States Code, of the misdemeanor of contempt of Congress, for failing to produce records of the organization, pursuant to a subpoena of a Congressional Committee con- [fol. 108] ducting an investigation. The conviction was affirmed—one judge dissenting—by the United States Court of Appeals for the District of Columbia (*Barsky* v. *United States*, 167 F. (2d) 241); a petition for a writ of certiorari was denied by the United States Supreme Court in June, 1948 (334 U. S. 843) and a petition for rehearing was denied two years later, with a notation that two of the justices were of the opinion that the petition should be granted (339 U. S. 971). Barsky served a term of five months in prison.

The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6514, subd. 4; Sec. 6517). It summarized "the issues litigated and not litigated at the criminal trial" in this way: "There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient." The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment.

With regard to the reasons given by Barsky and the other members of the Refugee Committee for withholding records called for by the subpoena, the Regents' Committee on Discipline wrote as follows:

> "They had been advised by counsel that the subpoenas were invalid. * * * They asserted that * * * (none) of their activities fell within the scope of the matters into which * * * the Congressional Committee was authorized to inquire. These facts,

[fol. 109] they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad', and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or who were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945 (before the subpoenas were issued), asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined by the courts.

"If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Com-[fol. 110] mittee's course could be judicially determined, and the traditional method by which such legal questions are raised (*Sinclair* v. *United States*, *supra* (279 U. S. 263)). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis."

And, commenting on the crime of which appellant was later convicted, the Regents' Committee found that "no moral turpitude" was involved. (See *Sinclair* v. *United States*, 279 U. S. 263, 299.)

Those findings are not here questioned; actually, they rest, in large part, on concessions of the Attorney General at the hearing before the Medical Grievance Committee.[1] Thus, he conceded that appellant was advised by counsel that "the subpoenas were unconstitutionally issued and that he was not legally required to respond to them"; that that opinion at that time was not "an unreasonable construction of law"; and that the same opinion "was held by many lawyers and some jurists"—indeed, by one of the federal Court of Appeals judges who heard the criminal appeal. In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair* v. *United States, supra*, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients.

[fol. 111] Upon such facts, it should require exceedingly plain language to cause a court to conclude that the legislature has authorized appellant's suspension from practice for six months or, indeed, as the court implies, the revocation of his license.

The court chooses to find such language in that portion of the section of the Education Law which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without the state, of a crime." It is urged that this language "is too plain to permit construction by addition of unexpressed qualifications or exceptions" (Opinion, p. 2). In that I cannot concur. Experience has taught that sheer

[1] It should be noted that, when the parties were before the Regents' Committee on Discipline, counsel stipulated that that Committee should consider and take into account matter not in the record of the hearing before the Medical Grievance Committee, including specifically the record of the criminal case in the federal court.

literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e. g., *People ex rel. Marks* v. *Brophy, supra*, 293 N. Y. 469; *Matter of Donegan*, 282 N. Y. 285; see, also *Matter of Garsson* v. *Wallin*, 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra*, 282 N. Y. 285, 292), we said that discipline "partakes of the nature of punishment," with the consequence that statutes imposing discipline "must be strictly construed," and, in the *Marks* case (*supra*, 293 N. Y. 469, 474), we declared, to "decree forfeitures • • • because of violations of the criminal laws of another jurisdiction," is contrary to the established "public policy of this State".

For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to. There is nothing new in the words [fol. 112] "convicted • • • without this state"; the *Marks* case (*supra*, 293 N. Y. 269) dealt with virtually identical language and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agreement—*conviction of "a felony, 'either in New York State or any other state'* "—declared (293 N. Y., at p. 474):

> "The Atkins case (248 N. Y. 46, supra), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of 'any felony,' the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this relator should suffer a similar forfeiture if convicted of 'a felony, either in New York State or any other state' meant the same thing."

Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to war-

rant the imposition of an additional penalty in this state. It must be a particular kind of conviction.

"Felony," as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N. Y. 285) or the governor (*People ex rel. Marks* v. *Brophy, supra*, 293 N. Y. 469) used the word "felony", they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N. Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (Sec. 88, subds. 3, 4; sec. 477; now numbered sec. 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old sec. 88, subd. 4; present sec. 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logi- [fol. 113] cally and reasonably be presumed that our legislature, when it required disbarment for conviction of a federal "felony," considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for violations of the laws of another jurisdiction and in view of the requirement that the statute be strictly construed.

So, here, where the legislature has declared that it must be a conviction of a "crime," the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving "felony" and the one before us involving "crime"— the argument is far stronger for limiting the term "crime" than it is for limiting the term "felony." In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad "crimes" in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's "without the state," if sheer

literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—"in some other state (or country) * * * which we in New York consider non-criminal, or even meritorious."[2]

[fol. 114] It seems almost incredible to me that the legislature could have contemplated that such "non-criminal" or "meritorious" acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is pointed out that such "a literal construction * * * will empower the Board of Regents to destroy a person" without the slightest warrant—that "some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases" (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184, 190, a "statute's validity must be judged not by what has been done under it but 'by

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[2] The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (sec. 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) Sec. 55-103, Sec. 41-811, and see *Nations* v. *State*, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e. g., Ala. Code (1940) tit. 48, sec. 301 (31a); La. S. A.-C. C. (1950) Art. 45, Sec. 195; N. C. Gen. Stat. (1950) Sec. 62-121.71-72, and see *State* v. *Johnson*, 229 N. C. 701; S. C. Code (1952) Sec. 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) Sec. 56-329, and see *New* v. *Atlantic Greyhound Corp.*, 186 Va. 726). And, in Kansas, it is a crime to sell or even to drink alcoholic liquor in a public place. Kansas Gen. Stat. (1949) ch. 41-719, 803, and see *State* v. *Shackle*, 29 Kans. 341.)

what is possible under it.' " And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career.

As a matter of statutory construction alone, without considering whether such legislation may be constitutionally enacted, we should not attribute to the legislature a design so palpably harsh and extreme. (See *Matter of Rouss*, 221 N. Y. 81, 91, where the court declared, "Consequences cannot alter statutes, but may help to fix their meaning.") While affirmance herein may affect only appellant, the present decision has an importance that transcends and [fol. 115] reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me. As I have sought to show, the only reasonable construction—and the one required by our precedents—is that only those acts, recognized by the laws of this state as criminal in nature, are encompassed by the statute before us.

In point of fact, the Regents' Committee on Discipline suggested that the charge against appellant might be sustained upon the ground that the federal crime of which he was convicted finds its analogue in section 1130 of our Penal Law—which provides that one who willfully refuses to produce documents before the state legislature or one of its committees, is guilty of a misdemeanor. The court has found it unnecessary—in the view that it has here taken—to consider that possibility, and, that being so, I see little to be gained by discussion of the matter.

However, at least one other question remains for decision.

After noting that the courts would ultimately have to decide whether appellant's crime was one contemplated by the statute, the Regent's Committee turned to the subject of discipline and wrote that there was no basis in the facts presented for any punishment greater than censure and reprimand:

> "While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline beyond the statutory minimum of censure and reprimand must, we believe, be based either on the inherent nature of the respondent's

violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline."

And it ended its report in this way:

[fol. 116] "Since violation of the Federal statute which * * * (appellant) has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of * * * (appellant's) explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that * * * (appellant's) license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded."

The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances—made, it must be remarked, on a record less complete than the one before the Committee on Discipline.[3]

This court has heretofore declined, in most instances, to consider the measure of discipline imposed by an adminis-

[3] While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that "Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States." Reliance upon that fact, was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.)

trative agency. (But cf. *Matter of Tompkins* v. *Board of Regents*, 299 N. Y. 469, 476-477.) That is a subject, we have concluded, that rests in the discretion of the agency. However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory [fol. 117] authority of the Regents is, in truth, as the court here holds,[4] so broad, so unrestrained, then, I venture, the statute transcends constitutional limits.

It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent, or dishonest practitioners of medicine or of plumbing is, of course, for the legislature to decide. But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos* v. *United States District Court*, 19 F. (2d) 722.)

In sum, then, the court's construction of the Education Law provision, particularly when taken with its grant to the Board of Regents of uncontrolled discretion, not only as to the matters on which they may rely in reaching a determination but also as to the measure of discipline, places the statutory scheme beyond the bounds of what

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[4] In the course of its opinion, the court has written (Opinion p. 6):

> "As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to review such questions." (Emphasis supplied.)

is permitted to the legislature. To me, it seems not merely delegation run riot but legislative abdication. A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may [fol. 118] be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to "the good sense and judgment" of the Regents, but, while "good sense and judgment" are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that "crime" has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss "of all that makes life worth living". (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284.) Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small* v. *Moss*, 279 N. Y. 288, 299, we declared that "The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer," and in *Packer Collegiate Inst.* v. *University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we stated that "there must be a clearly delimited field of action and, also, standards for action therein." (See, also, Niemotko vs. Maryland, 340 U. S. 268, 273; Matter of Fink vs. Cole, 302 N. Y. 216, 225.) The wisdom of that constitutional safeguard is highlighted by its disregard in this case.

For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or antici- [fol. 119] pated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall.

(U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this Court, prevent any other conclusion.

I would reverse.

Others affirmed, opinion by Desmond, J., in which all concur except Fuld, J., who dissents in an opinion.

[fol. 120] In Court of Appeals of State of New York

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of February in the year of our Lord one thousand nine hundred and fifty-three, before the Judges of said Court.

Witness, the Hon. John T. Loughran, Chief Judge Presiding. Raymond J. Cannon, Clerk.

[fol. 121] In the Matter of the Application of Dr. Edward K. Barsky, Appellant

For a Review under Article 78 of the Civil Practice Act, of the determination of The Board of Regents of the University of the State of New York, &c., Respondent.

Remittitur—February 27, 1953

Be it remembered, That on the 5th day of August in the year of our Lord one thousand nine hundred and fifty-two, Dr. Edward K. Barsky, the appellant in this cause, came here unto the Court of Appeals, by Abraham Fishbein, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The Board of Regents of the University of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Paxton Blair, of counsel for the appel-

lant, and by Mr. Henry S. Manley, of counsel for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 122] Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justice thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York. Court of Appeals, Clerk's Office, Albany, February 27, 1953.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] In Court of Appeals of State of New York

Present: Hon. Edmund H. Lewis, Senior Associate Judge, Presiding

[Title omitted]

Order Denying Motion for Reargument, Granting Stay and Amending Remittitur—April 16, 1953

A motion for reargument, for a stay of all proceedings pending a direct appeal or a petition to the Supreme Court of the United States for certiorari, and to amend the remittiturs in the above causes having been heretofore made

upon the part of the appellants herein, and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further ordered, that the said motion, insofar as it seeks a stay of all proceedings pending a direct appeal, or a petition to the Supreme Court of the United States for certiorari, be and the same hereby is granted, and it is

[fol. 124] Further ordered, that the said motion, insofar as it seeks to amend the remittiturs, be and the same hereby is granted by adding thereto the following:

> Upon the appeals herein there were presented and necessarily passed upon questions under the Federal Constitution, viz., whether sections 6514 and 6515 of the Education Law, as construed and applied here, are violative of the due process clause of the Fourteenth Amendment. This Court held that the rights of the petitioners under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied.

(Sgd.) Gearon Kimball, Deputy Clerk. (Seal.)

[fol. 125] In Court of Appeals of State of New York

[Title omitted]

Petition for Appeal—May 5, 1953

Considering himself aggrieved by the final order and judgment of this Court entered on the 26th day of February, 1953, petitioner-appellant Dr. Edward K. Barsky herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final order and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said petitioner-appellant pending the final disposition of this appeal and that the amount of security be fixed in the sum of $250 by the order allowing the appeal and that the material parts

of the record, proceedings and papers upon which the said final order and judgment were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided; that upon the allowance of said appeal, and the filing and approval of the appeal bond by this Court, that said mandate, order and judgment of this Court entered on February 26, 1953 and the suspension of the medical license of petitioner-appellant Dr. Edward K. Barsky, be stayed in all respects [fol. 126] pending the final disposition of said appeal.

Respectfully submitted, Abraham Fishbein, Counsel for Petitioner-Appellant, Dr. Edward K. Barsky.

Dated: New York, May 5, 1953.

[fol. 127] In Court of Appeals of State of New York

[Title omitted]

Order Allowing Appeal—May 7, 1953

Dr. Edward K. Barsky, petitioner-appellant, having made and filed his petition for an appeal to the Supreme Court of the United States from the final order and judgment of this Court in this cause, entered on the 26th day of February, 1953, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal and his statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is fixed in the sum of $250. with good and sufficient surety and shall be conditioned as may be required by law, and that the mandate, judgment and order of this Court, and the suspension of the medical license of the appellant Dr. Edward K. Barsky be and is suspended and stayed until the final termination of said appeal to the Supreme Court of the United States.

[fols. 128-130] It is further ordered that citation shall issue in accordance with law.

Dated: Albany, New York.
May 7, 1943.

Edmund H. Lewis, Chief Judge of the Court of Appeals.

[fols. 131-133] Citation in usual form showing service on Henry S. Manley omitted in printing.

[fols. 134-138] Cost Bond on appeal for $250.00 and filed May 7, 1953, omitted in printing.

[fol. 139] In Court of Appeals of State of New York

[Title omitted]

Assignment of Errors and Prayer for Reversal—May 6, 1953

Dr. Edward K. Barsky, petitioner-appellant in the above entitled cause, in connection with his appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which he will rely in his prosecution of said appeal from the final order and judgment of the Court of Appeals of the State of New York, entered on February 26, 1953.

The Court of Appeals of the State of New York erred:

(1) In refusing to hold that Appellant was deprived of the guarantee of due process by a construction of the undefined word "crime" in Section 6514 (2b) of the New York State Education Law, so unlimited in scope, that the New York medical licenses of Appellant and all New York physicians are subject to suspension or revocation upon conviction "anywhere" in the world of an act that is deemed an offense there but that is not an offense or may be "even meritorious" in New York.

[fol. 140] (2) In refusing to hold that Appellant was deprived of his liberty and property without due process, by such a construction of the word "crime" in Section 6514 (2b) of the New York State Education Law, that the New York medical license of the Appellant was suspended for six months upon his conviction in the Federal Court of the District of Columbia, of an act that was only deemed an offense there, but that was not an offense under the laws of New York.

(3) In holding that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, do not violate the due process clause of the Fourteenth Amendment or the constitutional guarantees against double jeopardy and double punishment, by the addition of the domestic penalty of a six months' suspension of Appellant's New York medical license to the six months' jail sentence Appellant has already served for his conviction in a jurisdiction outside of New York, of an act that admittedly involves neither moral turpitude nor intellectual unfitness and that is not an offense in New York.

(4) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, violate the constitutional guarantees against double jeopardy and double punishment, and deprived Appellant of due process, by serving as the basis for the suspension of Appellant's New York medical license for six months, by reason of his conviction in a jurisdiction outside of New York for an act that is not related to the practice of medicine.

(5) In refusing to hold that the fact that a "crime", mentioned in Sections 6514 and 6515 of the New York State Education Law, "has been committed *somewhere*, is too [fol. 141] vague, too capricious, too unrelated to anything that a citizen" of New York "is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally" (dissenting opinion), and that therefore Appellant was deprived of his liberty and property without due process.

(6) In refusing to hold that Sections 6514 (2b) of the New York State Education Law on its face and as construed and applied, with particular reference to the undefined

word "crime" therein, is so vague and its meaning so uncertain, that the enforcement of that statute violated the right to due process guaranteed to Appellant by the Fourteenth Amendment.

(7) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, violate the constitutional precept against legislative abdication, by leaving only to the "good sense and judgment" of the Appellee, without any other "standards", those foreign offenses that are not offenses in New York, for the conviction of which Appellee may institute disciplinary proceedings and impose a suspension or revocation of a New York medical license, including the suspension of Appellant's medical license.

(8) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, violate the constitutional precept against legislative abdication, by leaving the type of punishment to be imposed by the Appellee upon the Appellant and all New York physicians convicted of an offense "anywhere", to the good sense and judgment" and the unfettered discretion of the Appellee, without guide-posts or standards correlating the type of punishment with the type of offense.

[fol. 142] (9) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face, and as construed and applied, violate the constitutional guarantee against legislative abdication by giving the Appellee unlimited, arbitrary power to suspend or revoke a medical license, including the power to suspend Appellant's license for six months, upon the physician's foreign conviction of an act that is not related to the medical practice, or to the regulation of the medical practice in the interests of the public of New York State, that involves neither moral turpitude nor intellectual unfitness, and that is not an offense in New York.

(10). In refusing to hold that Sections 6514 and 6515 of the New York State Education Law as construed and applied, deprive Appellant of due process by making Appellant's conviction in a jurisdiction outside of New York an automatic "professional fault" despite the fact that the

statutes provide for a hearing on the merits to ascertain whether Appellant is guilty or not guilty.

(11) In failing to hold that to construe the hearing mentioned in Sections 6514 and 6515 of the New York State Education Law as being limited to a hearing before a sentencing judge and solely for the purpose of taking testimony relating to the punishment to be imposed and not as to Appellant's actual guilt or innocence, deprived Appellant of a real and judicial hearing, and of the guarantee of due process.

(12) In refusing to hold that Appellant was deprived of due process and a fair hearing by reason of the admission in evidence of and the predicating of a finding by Appellee on, the listing of the Joint Anti-Fascist Refugee Com- [fol. 143] mittee on the United States Attorney General's subversives list.

(13) In refusing to hold that Appellant was deprived of due process and a fair hearing, by reason of the admission in evidence of the judicial dismissal of the complaint of the Joint Anti-Fascist Refugee Committee against the listing of that organization on the United States Attorney General's subversives list, and in disregarding the subsequent reversal thereof and the holding in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

(14) In refusing to hold that Appellant was deprived of his liberty and property without due process and of a real, judicial "hearing on the merits" under Sections 6514 and 6515 of the New York State Education Law, because the Appellee upon the hearing admittedly "ignored weighty considerations and acted upon matters not proper for consideration" (majority opinion), including "the gross and prejudicial error" (notes 3 and 4 in dissenting opinion), in connection with the listing and the reversal mentioned in the assignments of error numbered 12 and 13.

(15) In refusing to hold that Appellant was deprived of his liberty and property without due process, by the denial of his right to judicial review of a hearing in which the Appellee admittedly "ignored weighty considerations and acted on matters not proper for consideration," and committed "gross and prejudicial error".

(16) In refusing to hold that Appellant was deprived of

due process by the denial of his right to judicial review of the arbitrary, unreasonable and oppressive six months' suspension of Appellant's medical license, imposed by the [fol. 144] Appellee despite and in disregard of a report of Appellee's own Committee on Discipline that on the record there was no valid basis for the imposition of more than the statutory minimum of a censure.

(17) In failing to hold that Sections 6514 and 6515 of the New York State Education Law, as construed and applied, deprived Appellant of and violated the guarantees of, equal protection and due process, by imposing the arbitrary, oppressive, severe and unreasonable penalty of a six months' suspension of his New York medical license on top of the six months' jail sentence served because of Appellant's test of the validity of the legislation and acts resulting in his conviction in the Federal Court in the District of Columbia.

(18) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law on their face and as construed and applied, deprived Appellant of due process, by the conflicting, unreasonable, arbitrary and oppressive constructions thereof whereby the licenses of New York physicians are not subject to suspension or revocation under Section 6514 on conviction of a felony outside of New York that is not a felony in New York, but are subject to suspension or revocation under the same Section 6514 on conviction outside of New York of the lesser offense of a misdemeanor that is similarly not an offense in New York.

(19) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law as construed and applied are arbitrary, unreasonable and oppressive class legislation bearing no relationship to the regulation of the medical practice in the interests of the public of New York State. [fol. 145] (20) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law, are arbitrary, unreasonable and discriminatory class legislation, discriminating without rational basis, in favor of physicians convicted outside of New York of felonies that are not felonies in New York, and against physicians convicted outside of New York of lesser offenses that are not offenses in New York.

(21) In failing to hold that Sections 6514 and 6515 of the New York State Education Law were employed by the Appellee as bills of attainder against the Appellant, to inflict punishment upon him for matters unconnected with the medical practice, and for past, lawful associations, and without a judicial hearing on the merits, and by fixing the amount of punishment by an arbitrary and capricious disregard of the evidence and of the report of its own Committee on Discipline.

(22) In failing to hold that Sections 6514 and 6515 of the New York State Education Law as construed and applied, disregard the constitutional precept that a State cannot impose a domestic penalty, including the suspension of Appellant's medical license, for acts outside New York, in the District of Columbia, where the Congress and the United States have the sole power of legislation and exclusive jurisdiction.

(23) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law, as applied, disregard Title 18 U. S. C. Section 402, a law of the United States, and thus violate Article VI of the Constitution.

(24) In refusing to hold that Sections 6514 and 6515 of the New York State Education Law, as applied, disregard the constitutional differentiation between a Law and a Resolution contained in, and therefore violate, Article 1 Section 7 of the Constitution.

[fos. 146-148] (25) In holding that the meaning of "crime" as used in Section 6514 (2b) of the New York State Education Law, is clear and definite and does not (despite the absence of legislative or administrative standard for application except the "good sense and judgment" of the Appellee) amount to legislative abdication with authority to Appellee to determine its meaning and the limits of its application, and does not deprive Appellant of due process.

(26) In refusing to set aside and annul the determination suspending Appellant's medical license for six months.

Wherefore Petitioner-Appellant prays that the order and judgment of the Court of Appeals of New York State entered February 26, 1953, be reversed, the determination

annulled, and for such other relief as the Court may deem proper.

Dated: New York, May 6th, 1953.

Abraham Fishbein, Counsel for Petitioner-Appellant.

[fols. 149-155] Statement Required by Paragraph 2 Rule 12 of the Rules of the Supreme Court—(Omitted in Printing)

[fols. 156-158] In Court of Appeals of State of New York

[Title omitted]

Stipulation Waiving Printing of the Minutes and Exhibits—May 6, 1953

It is stipulated that printing of the stenographic minutes of the hearings before the appellee and of the exhibits submitted upon said hearings, are waived and the typewritten minutes, and the exhibits may be submitted to the Supreme Court of the United States in their original form and may be referred to and used in the briefs of the parties and by the United States Supreme Court for decision, as fully as though printed.

Dated: May 6, 1953.

Abraham Fishbein, Counsel for Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Appellee.

[fols. 159-164] Praecipe (omitted in printing)

[fol. 165] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 13, 1953

Appellant adopts his Assignment of Errors heretofore filed herein, as his Statement of the Points to be relied upon in his appeal to this Court.

Appellant designates the following portions of the Record filed herein, for printing by the Clerk of this Court.

	Record on Appeal page
1. Appellee's charges against Appellant	
2. Amended answer of Appellant	
3. Report of findings, determination and recommendation of Sub-Committee of Committee on Grievances	29
4. Certificate of Secretary of Committee on Grievances	35
5. Report of Regents' Committee on Discipline	37
6. Resolution of the Board of Regents	65
7. Order of Suspension	26
8 Petition for Review	5
9. Answer and Return (It will only be necessary to print the answer because the items of the Return were mentioned in the preceding items)	27
10. Order transferring Proceeding to Appellate Division, Third Department	3
11. Decision by Appellate Division, Third Department	72
12. Order of Appellate Division confirming Determination of Board of Regents	71
[fols. 166-167] 13. Order of the Appellate Division granting leave to appeal to the Court of Appeals	69
14. Notice of Appeal to the Court of Appeals	67

page

15. Order of the Court of Appeals affirming judgment of the Appellate Division, Third Department
16. Opinions of the Court of Appeals
17. Order denying motion for reargument, and granting stay and federal certificate
18. Petition for Appeal to the United States Supreme Court
19. Order allowing Appeal
20. Citation on Appeal
21. Assignment of Errors
22. Statement as to Jurisdiction of the Supreme Court of the United States
23. Statement directing attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States
24. Acknowledgment of Receipt and Acceptance of Service of Papers on Appeal to the United States Supreme Court and Praecipe
25. Stipulation waiving printing of the Minutes and Exhibits
26. The Praecipe

The parties have waived printing of the stenographic minutes of the hearings before the Appellee and have further waiver printing of the Exhibits submitted upon said hearings. The parties have agreed that the typewritten minutes and Exhibits may be submitted to the Supreme Court of the United States, in their original form, and may be referred to and used in the briefs of the parties, and by the United States Supreme Court for decision, as fully as though printed.

Dated: New York, May 7, 1953.

Abraham Fishbein, Counsel for Appellant.

[fol. 168] [File endorsement omitted.]

[fol. 169] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 69

DR. EDWARD K. BARSKY, Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

The Chief Justice took no part in the consideration or decision of this question.